IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VANCE DANIEL MASON,

Plaintiff,

vs.

WASHINGTON COUNTY, et al.,

Defendants.

No. 97-CV-1053-BU (W)

ORDER

Before the Court is Plaintiff's motion to dismiss with prejudice (Docket #5) filed in this matter on February 27, 1998. Plaintiff states that "upon extensive contemplation as to the merits of the claim filed herein, I have concluded that it would serve no purpose to pursue this cause any further. WHEREFORE, Plaintiff respectfully requests this Court to Dismiss this cause with prejudice." By Order dated February 19, 1998, the Court dismissed this action without prejudice for failure to prosecute. Therefore, the Court finds that Plaintiff's motion should be denied as moot. However, based on Plaintiff's request, the Court further finds that the February 19, 1998 Order should be amended to provide that this action is dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to dismiss with prejudice (Docket #5) is **denied as moot.**

2. The February 19, 1998 Order dismissing this cause without prejudice (Docket #4) is amended to provided that this action is **dismissed with prejudice.**

SO ORDERED THIS _____ day of March, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARSHALL HUFFMAN and VIRGINIA NEWTON,

Plaintiffs,

v.

SAUL HOLDINGS LIMITED PARTNERSHIP, a Maryland limited partnership,

Defendant.

Case No. 97-C-602-H

ORDER

This matter comes before the Court on Defendant Saul Holdings Limited Partnership's ("Saul") motion for summary judgment (Docket # 8). Plaintiffs Marshall Huffman and Virginia Newton brought this action alleging breach of contract, rescission, and fraud relating to two commercial leases at the Crosstown Shopping Center in Tulsa. Saul counterclaimed for amounts owed under the two leases, and has moved for summary judgment with respect to both Plaintiffs' claims and its counterclaim.

Saul is the owner of the Crosstown Shopping Center. On November 6, 1995, Plaintiffs, as tenants, executed a lease renting property in the shopping center. Plaintiffs executed a second lease on February 22, 1996, renting additional space in the shopping center. As to the first lease, Saul claims Plaintiffs owe $49,351.96 in rental and other charges from November 6, 1995 to December 30, 1997, in addition to accruing rent and other charges until the end of the lease term on July 1, 2001. As to the second lease, Saul claims Plaintiffs owe $74,778.13 in rental and other charges from May 1, 1996 to January 1, 1998, in addition to other charges until the end of the lease term on February 1, 2001.

(29)

In contrast, Plaintiffs seek damages for loss of business opportunity and lost profits due to Defendant's alleged failure to properly and timely repair the roof of the shopping center. Plaintiffs also claim damages in fraud for Defendant's alleged representation that a "large, anchor tenant" would lease space in the Crosstown Shopping Center and for an alleged representation that Defendant would "fix the shopping center up." Defendant has moved for summary judgment on these claims, as well as on its counterclaim for unpaid rent.

I

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II

Saul has first moved for summary judgment on Plaintiff's breach of contract action for lost business and profits for Saul's failure to timely and properly repair the leaking roof at the leased premises. Saul claims that, according to the lease, it is not responsible for damage to Plaintiffs' property, which includes lost business and damage to business reputation.

Paragraph 16 of both leases provides as follows:

> Landlord agrees to make all necessary repairs during the term of this Lease or any extension thereof, to the roof of the Premises and all necessary structural repairs to the exterior walls and foundations, . . . provided such repairs are not made necessary through misuse of the same by the Tenant or the negligence of Tenant, its agents, servants, contractors or employees, and provided that Tenant shall give Landlord written notice of the necessity for such repairs. Landlord shall not be liable to Tenant for any damage caused to the person or property of Tenant, its agents, employees or invitees, due to the Premises or any part or appurtenances thereof being improperly constructed or being or becoming out of repair or arising from the leaking of gas, water, sewer or steam pipes, or from electricity, or from any other cause whatsoever . . . . Landlord shall not be liable in any such case for any inconvenience, disturbance, loss of business or any other annoyance arising from the exercise of any or all of the rights of Landlord in this Article 16.

Lease ¶ 16 (emphasis added). Defendant contends that paragraph 16 precludes liability for damage to Plaintiffs' property because Plaintiffs' claim for loss of business is simply damage to property, liability for which is excluded under the lease. In contrast, Plaintiffs assert that the phrase "property" simply means personal property and does not encompass a loss of business. Moreover, Plaintiffs contend that if "property" meant loss of business, then that term, rather than the specific exclusion for "loss of business," would not have been used in the last sentence of paragraph 16.

The Court finds that the exclusion of liability for "property" in paragraph 16 cannot be determined to include Plaintiffs' claim for loss of business as a matter of law. Instead, there are disputed issues of fact with respect to the intent of the parties and the meaning of this term as it relates to Plaintiffs' claim for failure to repair the leaking roof.

However, Saul also claims that it is not responsible for Plaintiffs' loss of business pursuant to paragraph 23 of the lease. This paragraph provides in pertinent part as follows:

> Tenant agrees to indemnify and save Landlord and Landlord's partners, officers, directors, employees and agents harmless from any and all liabilities, damages, causes of action, suits, claims, judgements, costs and expenses of any

> kind (including attorneys fees): (i) relating to or arising from or in connection with the possession, use, occupancy, management, repair, maintenance or control of the Premises, or any portion thereof; (ii) arising from or in connection with any act or omission of Tenant or Tenant's agents, employees or invitees; or (iii) resulting from any default, violation or injury to person or property or loss of life sustained in or about the Premises. To assure such indemnity, Tenant shall carry and keep in full force and effect at all times during the term of this Lease for the protection of Landlord and Landlord's Managing Agent and Tenant herein, public liability and property damage insurance with combined single limits of not less than One Million Dollars ($1,000,000.00) per occurrence; with not less than a Two Million Dollar ($2,000,000.00) aggregate per location.

Plaintiffs allege that this indemnification provision is unenforceable because the parties are in unequal bargaining positions. Plaintiffs assert that Saul is a "multi-million dollar organization" with "extensive experience in the real estate industry," while claiming that Plaintiffs are only "small business owners and operators." Pl.'s Br. at 13-14.

The Tenth Circuit has stated that a contractual exculpatory provision is valid if three conditions are met: "(1) the parties must express their intent to exculpate in unequivocally clear language; (2) the agreement must result from an arm's-length transaction between parties of equal bargaining power; and (3) the exculpation must not violate public policy." Transpower Constructors v. Grand River Dam Auth., 905 F.2d 1413, 1420 (10th Cir. 1990). Saul argues that the parties were not unequal in bargaining power because negotiations for the contract took place over a period of ninety days and because there was no great time or economic pressure forcing Plaintiffs to enter into the lease. Saul further claims that its larger size as a business entity does not necessarily mean that it is in a superior bargaining position to Plaintiffs under the law.

The Court finds that the parties were not in an unequal bargaining position that would render the exculpatory provision in paragraph 23 unenforceable. Plaintiffs have not presented any credible evidence of duress, economic pressure, or unwillingness to negotiate the terms of the

lease. To the contrary, the lease negotiations took place over a lengthy period of time. Moreover, Plaintiffs' assertion of a difference in size between the businesses does not, by itself, render such a negotiated provision unenforceable. Accordingly, Defendant's claim that paragraph 23 prohibits Plaintiffs' claim for loss of business is hereby granted.

III

Saul has further moved for summary judgment, alleging that damages to Plaintiffs' reputation should not be allowed since these damages were not within the contemplation of the parties at the time the lease was signed. Under Oklahoma law, "[n]o damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin." Okla. Stat. tit. 23, § 21. See Coker v. Southwestern Bell Tel. Co., 580 P.2d 151, 153 (Okla. 1978) (holding that to be recoverable, damages must be the natural and probable result of any breach of contract). Where special circumstances exist, however, damages which result from those special circumstances are recoverable only if the circumstances were within the contemplation of the parties at the time of the contract. Florafax Intern., Inc. v. GTE Market Resources, Inc., 933 P.2d 282, 292 (Okla. 1997).

Plaintiffs claim damage to reputation because customers did not know where the business was operating after Plaintiffs relocated the business from the shopping center. Saul argues that these types of damages cannot be recovered since Plaintiffs have not meaningfully established the value of their business reputation or the causation between Saul's alleged breach and the alleged damage.

The Court notes that Plaintiffs did not address this claim in their response brief. Moreover, the Court finds that the damages for loss of reputation are highly speculative as to both

their nature and origin. Accordingly, the Court finds, as a matter of law, that these damages were not within the contemplation of the parties at the time of the lease. Therefore, Defendant's motion for summary judgment on this issue is hereby granted.

IV

Saul further claims that, as a matter of law, Plaintiffs cannot sustain an action for fraud. Specifically, Saul alleges that there was no material misrepresentation with respect to whether Saul would ensure that an anchor tenant would lease space within the shopping center. Saul further challenges Plaintiffs' allegation that Saul made material misrepresentations when stating that it would "fix up" the property.

To establish fraud under Oklahoma law, a plaintiff must show by clear and convincing evidence "a false material representation made as a positive assertion which is either known to be false, or made recklessly without knowledge of the truth, with the intention that it be acted upon by a party to his or her detriment." Federal Deposit Ins. Corp. v. Hamilton, 122 F.3d 854, 858 (10th Cir. 1997) (quoting Rainbow Travel Serv. v. Hilton Hotels Corp., 896 F.2d 1233, 1240 (10th Cir. 1990)); Bird v. Coleman, 939 P.2d 1123, 1126 (Okla. 1997).

Defendant contends that there is no evidence of a material misrepresentation upon which to support Plaintiffs' fraud claim with respect to securing an anchor tenant for the property. Plaintiffs admit that Saul did not "guarantee" an anchor tenant. Def.'s Fact No. 10. The undisputed facts also indicate that Defendant made several efforts to contact and to secure an anchor tenant for the property. Def.'s Facts Nos. 11 & 12. Since there is no evidence of a false material misrepresentation as to Defendant's securing an anchor tenant for the shopping center, Defendant's motion for summary judgment as to this claim is hereby granted.

Plaintiffs also assert that Defendant fraudulently induced Plaintiffs to enter into the lease when Defendant stated that it would "fix up" the property in question. Paragraph 1(b) of the leases, however, provides as follows:

> Except to the extent modified by Landlord's express assumption of construction obligations, if any, expressly provided for in this lease, the Premises are being leased "as is", and Landlord makes no warranty of any kind, express or implied, with respect to the Premises.

Lease ¶ 1(b). Paragraph 47 of the leases further states that "[t]his writing is intended by the parties as the final expression of their agreement and as a complete and exclusive statement of the terms thereof . . . . No representations, understandings or agreements have been made or relied upon in the making of this Lease other than those specifically set forth herein."

Considering these lease provisions, the Court finds that, as matter of law, Plaintiffs cannot sustain their action for fraudulent inducement based upon these statements. Since Plaintiffs had the opportunity to view the premises before leasing, since the lease specifically states that the property is in an "as is" condition, and since the lease is the exclusive agreement of the parties, there are no material misrepresentations which would have induced Plaintiffs to enter into the lease. Thus, Defendant's motion for summary judgment on this claim is also hereby granted.

V

Finally, Saul has moved for summary judgment on its counterclaim for rents owed under the lease. Saul contends that Plaintiffs are in default of the November 6, 1995 lease in the amount of $49,351.96, and are in default of the February 22, 1996 lease in the amount of $74,778.13. Plaintiffs, however, allege that they are not obligated to pay rent because Defendant materially breached the lease by failing to repair the roof.

Paragraph three of each lease states that "[t]he Minimum Rent shall be payable to Landlord or its designated agent in advance, in equal monthly installments, without notice or demand therefor, and without deduction, recoupment or setoff . . . ." Lease ¶ 3(a). Thus, Defendant asserts that Plaintiffs were required to pay the rent due under the lease, regardless of any alleged setoff or deduction for uncompleted repairs.

The Court finds that, as the lease clearly states, Plaintiffs were required to pay the rent due, despite Defendant's alleged failure to repair the roof. The contractual duties to pay rent and to repair the roof are independent obligations and deal with different subject matter. See Rogers v. Heston Oil Co., 735 P.2d 542, 546 (Okla. 1984) (stating that obligations in leases are independent where they deal with separate subjects). Thus, Defendant's alleged failure to perform his obligation with respect to the roof does not relieve Plaintiffs of their obligation to continue to pay rent. Accordingly, Defendant's motion for summary judgment on its counterclaim is hereby granted.

For the reasons set forth above, Defendant's motion for summary judgment (Docket # 8) is hereby granted.

IT IS SO ORDERED.

This 9TH day of March, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARSHALL HUFFMAN and VIRGINIA NEWTON,

Plaintiffs,

v.

SAUL HOLDINGS LIMITED PARTNERSHIP, a Maryland limited partnership,

Defendant.

Case No. 97-C-602-H

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on March 9, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff.

IT IS SO ORDERED.

This 9TH day of March, 1998.

Sven Erik Holmes
United States District Judge

(30)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON, ANNE E. HUTCHINSON, DENNIS P. BULLARD, ROBERT J. BULLARD, SHARON E. COLEGROVE, JODY L. HARTZLER, BARBARA L. LAWRENZ, RUTH ANN LIBBY, KATHRYN M. ROBINSON, and JOHN M. SPANTON,

Plaintiffs,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

Case No. 94-C-1134-E

JUDGMENT

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Richard Pfeil and Mary Jo Pfeil, and against the Plaintiffs, Thomas R. Hutchinson, Anne E. Hutchinson, Dennis P. Bullard, Robert J. Bullard, Sharon E. Colegrove, Jody L. Hartzler, Barbara L. Lawrenz, Ruth Ann Libby, Kathryn M. Robinson, and John M. Spanton. Plaintiffs shall take nothing of their claim. Costs may be awarded upon proper application.

Dated this 9th Day of March, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

63

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON, ANNE E. HUTCHINSON, DENNIS P. BULLARD, ROBERT J. BULLARD, SHARON E. COLEGROVE, JODY L. HARTZLER, BARBARA L. LAWRENZ, RUTH ANN LIBBY, KATHRYN M. ROBINSON, and JOHN M. SPANTON,

Plaintiffs,

vs.

RICHARD PFEIL and MARY JO PFEIL,

Defendants.

Case No. 94-C-1134-E

ORDER

Now before the Court is the Motion for Summary Judgment of the defendants Richard and Mary Jo Pfeil (Docket #15), The Request of Non-Party Hope Cobb for Clarification of Court's August 26, 1996 Order or an Expedited Ruling on Her Motion to Use Information Obtained from Sona Johnston to Protect Legal Interests Now "At Issue" in this Replevin Action (Docket # 37), Plaintiffs' Cross Motion for Summary Judgment (Docket #41), Defendant's Motion for Extension of Time to Respond to Plaintiffs' Motion for Summary Judgment (Docket #47), and Plaintiffs' Request for Oral Argument on the Parties' Cross Motions for Summary Judgment (Docket #49).

In this replevin action, Plaintiffs claim that a painting referred to as the "unfinished E.M.J. Betty," which is currently in the possession of the Pfeils, was stolen from the Artist, Theodore Robinson's, studio shortly after his death in 1896. Plaintiffs claim that the Pfeils, who purchased the painting in the 1980's, do not have valid title, and that they, as heirs of Theodore Robinson, are rightful owners of the painting. Plaintiffs claim that the unfinished painting was stolen from the

studio, given a forged signature and date, surreptitiously returned to the collection to hide the unauthorized sale of another painting, and then, apparently, stolen again, because it does not have a Theodore Robinson estate sale stamp on its back. They also claim that they could not have known that the painting was stolen until they had an opportunity to observe that it did not have an estate sale stamp on October 14, 1994.

Defendants filed a motion for summary judgment based on laches and the statute of limitations. Plaintiffs responded to the motion, denying that either laches or the statute of limitations barred the claim, and arguing that they were entitled to summary judgment because, under New York law, the Pfeils have the burden of proving that the painting was not stolen, and they are unable to do so. The Pfeils have not responded to the cross motion for summary judgment, and request that they have an opportunity to do so only if the Court overrules their motion. Because the defenses of laches and the statute of limitations are really threshold issues in this case, the Court finds that the Motion for Extension of Time to Respond to Plaintiffs' Motion for Summary Judgment (Docket #47) should be granted, and that the issues of laches and the statute of limitations should first be determined by this Court.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Defendants argue that "because of the extreme delay in bringing this action, it would be unconscionable to allow the Plaintiffs any recovery." They assert that the two elements of laches are: (1) an inexcusable delay in instituting suit, and (2) prejudice or injury to the defendant as a result of the inexcusable delay. Alexander v. Phillips Petroleum Co., 130 F.2d 593 (10th Cir. 1942). They note that, in determining whether there is an inexcusable delay, a plaintiff is charged with such knowledge as could have been obtained upon inquiry, if such facts would put a person of ordinary intelligence upon inquiry. Armstrong v. Mapleleaf Apartments, Ltd., 436 F.Supp. 1125, 1149 (N.D. Okla. 1977), aff'd 622 F.2d 466 (10th Cir. 1979), cert. den. 449 U.S. 901 (1980). In arguing that there was inexcusable delay in bringing suit, Defendants point out that the E.M.J. Betty has had several owners over the years, that the E.M.J. Betty was circulated, advertised, and exhibited for at least sixteen years prior to the filing of this suit, that no previous suit has been brought by plaintiffs or their ancestors to recover the painting, and that the alleged theft occurred in 1896.

Plaintiffs argue that there is a third element to laches -- one charged with laches "must have been aware of the conditions and of the reliance on his inaction and anticipated result." Clark v. Unknown Heirs, Exec., Admin., Devisees, Trustees and Assigns, Immediate and Remote of Osborn, 782 P.2d 1384, 1386 (Okla. 1989). Plaintiffs assert that the legal right drawn into issue by laches is

their right to recover possession of the painting. They argue that the defendants must prove that "the owner has an opprtunity to know of the possession of the property by another and demand its return before the lapse of time will bar the true owner's claim to recover the property." In re John Deere Tractor, 816 P.2d 1126, 1133 (Okla. 1991). Plaintiffs then assert: "That holding also assumes that the true owner has had an opportunity to know that the property was not legitimately acquired, but is stolen property." Plaintiffs claim that they could not have known that the painting was stolen until suit was filed in a related case and discovery responses were received.

Even assuming that John Deere Tractor requires that the true owner has had an opportunity to know that the property was stolen, the Court disagrees with plaintiffs that it is **their** knowledge alone that should be the focus of this inquiry. The painting was allegedly stolen in 1896, paintings were gathered shortly thereafter for an estate sale (which took place in March, 1898), and there was no action on any "missing" paintings at that time. The prejudice is clear. There is no one alive that knows what was in the artist's studio at the time of his death, that attended the 1898 auction, or knows the circumstances surrounding the "different signature" at the bottom of the Pfeil's "E.M.J. Betty."

The Court finds that the plaintiffs' claims are similarly barred by the two year statute of limitations, which begins to run when the plaintiffs knew or should have known of the whereabouts of the painting. In re John Deere Tractor. The plaintiffs' Complaint raises an issue as to the "forged signature" on the painting. That signature could have been detected by plaintiffs as early as the 1980's when the painting was routinely exhibited, and no later that July, 1992, when plaintiffs' examined the catalog Masterworks of American Impressionism From the Pfeil Collection. At that time, the plaintiffs would have been on inquiry notice as described in Armstrong, 436 F.Supp. at 1149. As the

plaintiffs themselves assert: "[b]usiness records maintained by Kennedy Galleries for almost thirty years raise questions about the provenance of the Pfeil 'E.M.J. Betty.'" Assuming that their theory is correct, that the "forged" signature proves that the picture was stolen, then an opportunity to know that the signature was "forged," would certainly give rise to a duty to inquire.

The Court must conclude that this action is unacceptably late both from the standpoint of statute of limitations and the doctrine of laches. Thus, the Pfeil's Motion for Summary Judgment (Docket #15) is granted. Because this motion is dispositive, the Court finds that The Request of Non-Party Hope Cobb for Clarification of Court's August 26, 1996 Order or an Expedited Ruling on Her Motion to Use Information Obtained from Sona Johnston to Protect Legal Interests Now "At Issue" in this Replevin Action (Docket #37) is moot because there is nothing currently "at issue" in this replevin action. Defendant's Motion for Extension of Time to Respond to plaintiff's Motion for Summary Judgment (Docket #47) is granted, plaintiff's Cross Motion for Summary Judgment (Docket #41) is moot and Plaintiff's Request for Oral Argument on the paties' Cross Motion for Summary Judgment (Docket #49) is denied.

IT IS SO ORDERED THIS 9TH DAY OF MARCH, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY EDWARD DURHAM,

Plaintiff,

vs.

STANLEY GLANZ, in his official capacity as Sheriff of Tulsa County,

Defendant.

Case No. C-92-1171-E

JOURNAL ENTRY OF CONFESSION OF JUDGMENT

This cause of action comes on for hearing on this 6TH day of March, 1998, the Plaintiff Timothy Edward Durham appearing with Counsel, Richard O'Carroll, and the Defendant Sheriff Stanley Glanz in his official capacity, appearing by Robert M. Gallant, Assistant District Attorney, for Tulsa County, Oklahoma. The Plaintiff and Defendant waive jury trial and try this cause to the Court. The Court finds that on February 17, 1998, the Board of County Commissioners of Tulsa County, Oklahoma, by motion during a regularly scheduled meeting, did unanimously enter into a compromise settlement agreement with plaintiff, without admitting negligence or liability in the case herein as to Sheriff Stanley Glanz *in his official capacity*, in the amount of fifty thousand dollars ($50,000.00). The Court further finds that the plaintiff is entitled to recover damages against defendant in the sum of fifty thousand dollars ($50,000.00).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff, Timothy Edward Durham, recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, as full settlement for the alleged claims in the above captioned case, in

ORIGINAL

124

the amount of fifty thousand dollars ($50,000.00) with interest from the date hereof at a rate not to exceed ten per cent (10%) per annum.

HON. JAMES O. ELLISON
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Richard O'Carroll
Attorney for the Plaintiff

Defendant:
Sheriff Stanley Glanz, *in his official capacity*,
Board of County Commissioners of Tulsa County, Oklahoma

By:
Robert M. Gallant, OBA # 15623
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. GLOVER,

Plaintiff,

v.

GARY ALRED, JIM ALRED, MIKAEL ALRED, PAWNEE LIVESTOCK SALES, INC., GARY STRAHAN, as Personal Representative of the Estate of J. B. SMITH, deceased, JOE SODERSTROM, SARAH SODERSTROM, OSAGE ANIMAL CLINIC, INC., SAM STRAHM, D.V.M., and JOHN DOES I THROUGH XX,

Defendants.

and

JOE SODERSTROM and SARAH SODERSTROM,

Defendants and Third-Party Plaintiffs,

v.

MID-ARK CATTLE COMPANY, INC.; BARRETT-CROFOOT, INC.; BARRETT-CROFOOT CATTLE, INC.; and JAMES F. LOWDER,

Third-Party Defendants.

Case No. 96CV 886B

ORDER GRANTING DISMISSAL WITH PREJUDICE OF PLAINTIFF'S CLAIMS AGAINST GARY STRAHAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF J. B. SMITH, DECEASED

Came on before the Court on this the 9th day of March, 1998, Plaintiff's unopposed Stipulation of Dismissal With Prejudice as to Defendant Gary Strahan, as Personal Representative of the Estate of J. B. Smith, Deceased ("Strahan"). Upon considering the stipulation and the agreement of

all parties in this matter, THE COURT FINDS that, pursuant to Fed. R. Civ. P. 41(a), Plaintiff's claims as to Strahan should be dismissed with prejudice with each party bearing its own costs, accordingly, it is

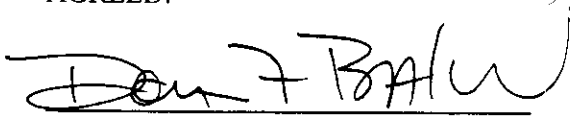
ORDERED, ADJUDGED AND DECREED that all of Plaintiff's claims as to Strahan are hereby dismissed with prejudice to the refiling of same, with each of those parties bearing their respective costs as to each other, and that this constitutes a final Order with respect to the claims between the Plaintiff, Thomas R. Glover, and the Defendant, Strahan.

JUDGE

AGREED:

Richard W. Lowry, O.B.A. #5552
Robert Alan Rush, O.B.A. #13342
Michael S. Linscott, O.B.A. #17266
Logan & Lowry, LLP
P. O. Box 558
Vinita, OK 74301
(918) 256-7511
(Attorneys for Plaintiff Thomas R. Glover)

AGREED:



Donn F. Baker, O.B.A. #443
Baker & Baker
303 West Keetoowah
Tahlequah, OK 74464
(918) 456-0618
(Attorney for Defendants Gary Alred and Mikael Alred)

AGREED:

Nathan H. Young, III, O.B.A. #9970
239 West Keetoowah
Tahlequah, OK 74464
(918) 456-8900 (fax: 918-456-3648)
(Attorney for Defendant Jim Alred)

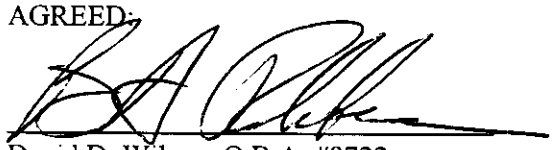
AGREED:

David L. Bryant, O.B.A. #1262
406 South Boulder Avenue, Suite 417
Tulsa, OK 74103
(918) 587-4200
(Attorney for Defendants Joe Soderstrom and
Sarah Jane Soderstrom)

AGREED:

Patrick O. Waddel, O.B.A. #9254
Gene G. Buzzard, O.B.A. #1396
Gable, Gotwals, Mock, Schwabe, Kihle & Gaberino
2000 Boatmen's Center
15 West Sixth Street
Tulsa, OK 74119-5447
(918) 582-9201
(Attorneys for Defendant Gary Strahan, as Personal Representative of the Estate of J. B. Smith, deceased)

AGREED:



David D. Wilson, O.B.A. #9722
Bruce A. Robertson, O.B.A. #13113
Wilson, Cain & Acquaviva
300 N.W. 13th Street, Suite 100
Oklahoma City, OK 73103
(Attorneys for Defendants Sam Straham, D.V.M.
and Osage Animal Clinic, Inc.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERRY WAYNE CLARK)
)
Plaintiff,)
)
vs.) Case No. 97-CV-18-B
)
SHERIFF STANLEY GLANZ, *ex rel*)
TULSA BOARD OF COUNTY COMMISSIONERS,)
B. JOHNSON, and D. CASEY, et al.,)
Defendants.)

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 9th day of March, 1998. The Plaintiff, Terry Wayne Clark, appearing by Counsel, Scott Troy. Defendants, Sheriff Stanley Glanz, *ex rel* Tulsa County Board of County Commissioners, B. Johnson, and D. Casey, appearing by Robert M. Gallant, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. On February 17, 1998, the Board of County Commissioners of Tulsa County, Oklahoma upon motion in a regularly scheduled meeting unanimously elected to confess judgment in the case herein in the amount of Thirty Thousand Dollars ($30,000.00) under the following conditions:

a. The Defendant, Board of County Commissioners, is in no way admitting any liability or fault on the part of Sheriff Stanley Glanz, B. Johnson, D. Casey, Tulsa County Board of County Commissioners, or any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma;

b. That the settlement of this case will result in a full release of any and all, past, present, or future claims against Defendants Board of County Commissioners of the County of Tulsa, Sheriff Stanley Glanz, B. Johnson, D. Casey and any other unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Terry Wayne Clark has or may have as a result of the incidents alleged to have occurred herein;

c. That the settlement of this case will result in a full release of any and all, past, present, or future claims for attorney's fees under 42 U.S.C. § 1988, and costs associated therewith against Defendant Board of County Commissioners of the County of Tulsa, Sheriff Stanley Glanz, B. Johnson, D. Casey as well as against any unnamed employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma, which Plaintiff Terry Wayne Clark or his attorney, Scott Troy, may have as a result of this judgment.

2. Plaintiff specifically reserves any rights against any other named parties not deemed to be employees and/or agents of the Tulsa County Sheriff or Tulsa County, Oklahoma.

3. Plaintiff is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff is entitled to recover the sum of Thirty Thousand Dollars ($30,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Thirty Thousand Dollars ($30,000.00), with interest from the date hereof not to exceed ten per cent (10%) per annum.

HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM AND CONTENT:

Terry W. Clark

TERRY WAYNE CLARK
Plaintiff

SCOTT TROY, OBA # 11714
Attorney for Plaintiff
406 South Boulder, Suite 405
Tulsa, Oklahoma 74103
(918) 585-3721

BOARD OF COUNTY COMMISSIONERS
OF TULSA COUNTY, OKLAHOMA
SHERIFF STANLEY GLANZ,
DEPUTY BOB JOHNSON,
DETENTION OFFICER DAVID CASEY

By: Robert M. Gallant

ROBERT M. GALLANT, OBA # 15623
ASSISTANT DISTRICT ATTORNEY
Attorney for Defendant
406 County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4873

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANICE DEMARCO, Surviving Spouse of RICHARD DEMARCO, Deceased,	)	
Plaintiff,	)	Case No. 94-C-863 BU
vs.	)	Hon. Michael Burrage
ELI LILLY AND COMPANY,	)	
Defendant.	)	

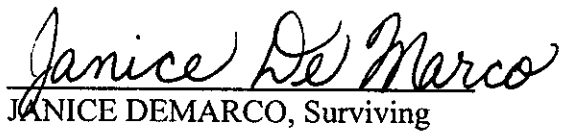
STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Janice DeMarco, surviving spouse of Richard DeMarco, deceased, and defendant Eli Lilly and Company hereby stipulate that this action shall be dismissed with prejudice with each party to bear its own costs. The parties further stipulate that the confidentiality agreement entered into by the parties and Nancy DeMarco Munson, Richard F. DeMarco, Jr., Gary DeMarco and Janice DeMarco Diasparra shall be incorporated by reference into the final order of dismissal and that the Court shall retain jurisdiction over any action regarding enforcement of the same.

WHEREFORE, the parties respectfully request that this Court enter the attached Order of Dismissal with Prejudice.

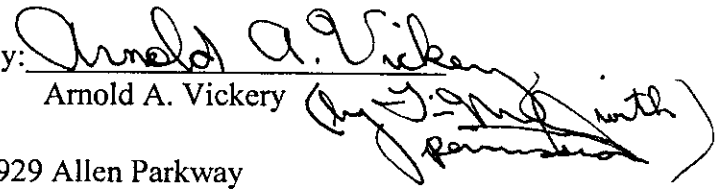
mail old

Respectfully submitted,



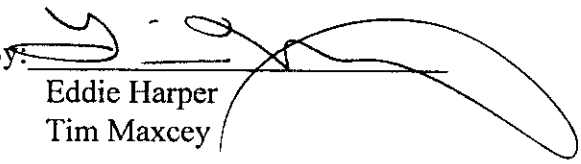
JANICE DEMARCO, Surviving
Spouse of Richard DeMarco, Deceased

ARCHER, WALDNER & VICKERY

By: 
Arnold A. Vickery

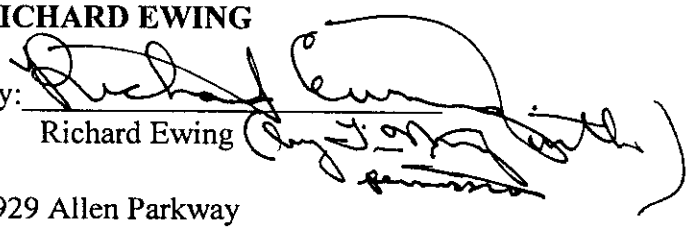
2929 Allen Parkway
Suite 2410
Houston, TX 77019
Telephone: (713) 526-1100
FAX: (713) 523-5939

STIPE LAW FIRM

By: 
Eddie Harper
Tim Maxcey

323 East Carl Albert Parkway
P.O. Box 1368
McAlester, OK 74502
Telephone: (918) 423-0421
FAX: (918) 423-0266

RICHARD EWING

By: 
Richard Ewing

2929 Allen Parkway
Suite 2410
Houston, TX 77019
Telephone: (713) 526-1100
FAX: (713) 523-5939

ATTORNEYS FOR PLAINTIFFS

SHOOK, HARDY & BACON, L.L.P.

By: Michelle R. Mangrum
Andrew See
Michelle R. Mangrum

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118
(816) 474-6550

GEISTER & WHALEY

By: _____
Charles E. Geister, III

120 N. Robinson Avenue, Suite 2520
Oklahoma City, Oklahoma 73102-7801
Telephone: (405) 239-6041
FAX: (405) 235-3090

ATTORNEYS FOR DEFENDANT ELI LILLY AND COMPANY

SPC

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	97CV713K (J)
DAVID ANDERSON,	)	
Defendant.	)	

DISMISSAL OF COMPLAINT

The Plaintiff, United States of America, hereby dismisses the above styled action against Mr. Anderson with prejudice on the basis that the parties have reached a settlement in this matter.

UNITED STATES OF AMERICA
Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CJ

7

CERTIFICATE OF MAILING

This is to certify that a copy of the above named Dismissal of Complaint was mailed postage prepaid to the following person on March 9, 1998:

Valley M. Branscum
Attorney at Law
P.O. Box 1331
Sapulpa, OK 74067

Herbert W. Wright, III
Paralegal Specialist

dismis.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97-CV-639-H(W)**
	)	
THE SUM OF NINETY-THREE THOUSAND SIX HUNDRED EIGHTY-ONE AND 06/100 DOLLARS ($93,681.06) IN UNITED STATES CURRENCY,	)	
	)	
Defendant.	)	

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant United States Currency and all entities and/or persons interested in the defendant United States Currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 10th day of July, 1997, alleging that the defendant United States Currency was subject to forfeiture pursuant to 18 U.S.C. § 981, because it is property involved in transactions or attempted transactions in violation of Title 18 U.S.C. §§ 1956 and/or 1957, or property traceable thereto, and is property which constitutes or is derived from proceeds traceable to a violation of 18 U.S.C. § 1341 or § 1344 affecting a financial institution.

Warrant of Arrest and Notice In Rem was issued on the 31st day of July 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant United States Currency and for publication in the Northern District of

Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant United States Currency on August 1, 1997.

Cindy Adams, Jesus Garcia, Juan Rodriguez, and New Concepts were determined to be the only parties with possible standing to file a claim to the defendant United States Currency, and, therefore the only parties to be served with process in this action, and were personally served as follows:

> Cindy Adams: personally served October 24, 1997
>
> Jesus Garcia: served by serving his attorney David Garvin, Esq. (who is authorized to accept service), on August 19, 1997
> Juan Rodriguez: served by serving his attorney David Garvin, Esq. (who is authorized to accept service), on August 19, 1997
>
> New Concepts: served by serving its attorney David Garvin, Esq. (who is authorized to accept service), on August 19, 1997;

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant United States Currency was located, on September 18 and 25, and October 2, 1997. Proof of Publication was filed October 14, 1997.

All persons and/or entities interested in the defendant United States Currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action,

whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant United States Currency, and no persons or entities have plead or otherwise defended in this suit as to said defendant United States Currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant United States Currency and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant United States Currency:

THE SUM OF NINETY-THREE THOUSAND SIX HUNDRED EIGHTY-ONE AND 06/100 DOLLARS ($93,681.06) IN UNITED STATES CURRENCY

be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 5th day of March, 1998.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\LPEADEN\FORFEIT\NEWCONCE\DEFAULT.JUD

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY L. NEWMAN,
SSN: 444-42-6619

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 97-C-184-H(J)

REPORT & RECOMMENDATION

Plaintiff, Betty L. Newman, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts that the Commissioner erred because (1) the ALJ improperly discounted evidence from the treating physician, (2) the ALJ did not properly consider Plaintiff's credibility, (3) the ALJ improperly evaluated Plaintiff's complaints of pain, (4) the ALJ made a "finding" of disability in his questions to the vocational exert, and (5) the ALJ improperly decided this case at step four of the sequential evaluation.[3/] For the

---

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on September 19, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on October 10, 1996. [R. at 6].

[3/] Plaintiff lists this "issue" in a section in her brief which identifies "Plaintiff's assignment of error." Plaintiff does not develop this argument in her brief.

reasons discussed below, the Magistrate Judge recommends that the District Court reverse and remand the Commissioner's decision for further proceedings.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on May 22, 1942. [R. at 40]. Plaintiff graduated high school and estimated that she had the approximate equivalent of two years vocational training provided by Southwestern Bell. [R. at 41]. Plaintiff worked at Southwestern Bell from 1974 until 1992, and stated that she stopped working when it became too difficult for her to lift her head to watch alarm display monitors. [R. at 46].

Plaintiff reads for approximately 45 minutes to one hour each day. [R. at 51]. Plaintiff testified that she spends 12-14 hours each day in bed. [R. at 52]. Plaintiff stated that she can stand approximately five to ten minutes, sit approximately 45 minutes to one hour, and lift 20 -25 pounds. [R. at 67-70]. Plaintiff testified that she walks approximately ten to fifteen minutes each day to the post office which is three-fourths of a mile from her residence. [R. at 74-75]. Plaintiff stated that she has numerous headaches, dizziness, cannot remember details, and experiences pain in her back, left shoulder and neck. [R. at 52-63].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

---

[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

5/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform a wide range of sedentary work. Based on the testimony of a vocational expert, the ALJ determined at Step Four of the sequential evaluation that Plaintiff could perform her past relevant work. The ALJ therefore concluded that Plaintiff was not disabled.

IV. REVIEW

Treating Physician

Plaintiff initially asserts that the ALJ erred by discounting the opinion of one of Plaintiff's treating physicians.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so.

Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

> (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

One of Plaintiff's doctors reported that Plaintiff could sit for zero to two hours during an eight hour work day, stand for zero to one hours during an eight hour work day and walk for zero to one hours during an eight hour work day. [R. at 223]. The ALJ discounted the physician's assessments because the physician provided no objective findings to support his assessment, the doctor's records did not support his assessment, and the doctor's assessment was inconsistent with the assessments of the other doctors in the record. The Court concludes that the ALJ's decision to discount the opinion of the treating physician was not error.

Evaluation of Plaintiff's Credibility

Plaintiff asserts that the ALJ discussed her daily activities and based on those activities concluded that Plaintiff was not credible. Plaintiff notes that the Eighth

Circuit has noted that a claimant does not have to establish that she is entirely bedridden to prove that she is disabled, and that daily activities which include attending church, fishing, and doing laundry do not constitute substantial evidence that an individual has the residual functional capacity to perform substantial gainful activity.

Plaintiff is partially correct. The mere ability to perform some daily activities does not, alone, constitute substantial evidence to support a conclusion that an individual can perform substantial gainful activity. However, an ALJ may use an individual's performance of some activities to discount the individual's credibility with respect to complaints of pain or testimony regarding perceived limitations. In this case, the ALJ noted that Plaintiff was able to go to the grocery store (and take her mother to the grocery store), was able to occasionally attend church, went to some movies, watched television, read books, newspapers and magazines, did her own laundry, lived alone for a period of time, walked each day, occasionally drove, and cooked once or twice each day. The ALJ noted that some of Plaintiff's activities were inconsistent with Plaintiff's professed limitations pain, and therefore discounted Plaintiff's credibility with respect to her limitations and pain. The ALJ did not find that Plaintiff's activities constituted substantial evidence that Plaintiff could perform sedentary work. Rather, the ALJ discounted Plaintiff's complaints of pain because of her level of activities. The ALJ's finding is proper under the applicable laws and regulations.

Analysis of Plaintiff's Pain

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

> [I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or

a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

The ALJ summarized Plaintiff's medical records and noted that few records indicated any objective medical evidence to show a condition that would result in the pain claimed by Plaintiff. The ALJ assessed Plaintiff's credibility. The ALJ's determination that Plaintiff did not suffer from disabling pain is supported by the record.

Plaintiff additionally notes that the ALJ used the wrong SSR in evaluating Plaintiff's complaints of pain. The Court concludes that under the facts in this case, the change in the regulation does not impact the decision of the ALJ.

"Finding" of Disability in Question to Vocational Expert

Plaintiff argues that the ALJ made a "finding" of disability when he questioned the vocational expert and that the ALJ never overcame this finding.

In questioning a vocational expert, an ALJ may present various hypothetical questions to the expert. The hypothetical questions do not constitute "findings." In the ALJ's decision, the ALJ should specify the RFC for the claimant and identify what jobs, if any, the claimant may perform based on the RFC. The ALJ should additionally indicate the evidence in the record which supports the ALJ's findings. The Court concludes that the questions presented to the vocational expert did not constitute "findings."

Step Four Evaluation

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

> The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.
>
> . . . .
>
> [D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

In this case, the ALJ found that Plaintiff was capable of performing sedentary work. [R. at 23]. The ALJ additionally found that Plaintiff's past relevant work was sedentary and that Plaintiff could, therefore, perform her past relevant work. The ALJ did not provide any details in his opinion as to Plaintiff's past relevant work. The ALJ did refer to the testimony of a vocational expert.

The vocational expert testified that Plaintiff's past relevant work in "electronic communications repair" involved several areas. The vocational expert noted that Plaintiff worked as central office repairer which was at the light skill level, and as a central office and equipment installer at the medium level. [R. at 77]. None of these "past relevant" jobs was at the "sedentary" level, and, consequently because the ALJ concluded that Plaintiff could perform only sedentary work, Plaintiff cannot return to these positions.

The vocational expert additionally testified that although he was not certain of the time period in which Plaintiff performed this job, her "initial work for the phone company was with the business office, and those would be, for example, a business office clerk, which would be at a sedentary exertional level and semiskilled." [R. at

77, *emphasis added*]. This is the only "past relevant work" which the vocational expert testified was performed at the sedentary level. However, this work was performed by Plaintiff when she initially began working at Southwestern Bell. Plaintiff worked at Southwestern Bell from 1974 until 1992 - a period of 18 years.

The regulations provide a "general rule" that the Commissioner will not consider work experience that was obtained more than fifteen years prior to the Commissioner's decision on disability.

> *Work experience* means skills and abilities you have acquired through work you have done which show the type of work you may be expected to do. Work you have already been able to do shows the kind of work that you may be expected to do. We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after fifteen years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. . . .

20 C.F.R. § 404.1565(a) (emphasis added).

In accordance with the applicable case law and regulations, the ALJ should delineate, in his opinion at Step Four the specifics involving Plaintiff's past relevant work and whether or not Plaintiff can still engage in her past relevant work. The ALJ did not do this, but instead relied on the testimony of a vocational expert. Assuming the ALJ could have properly relied on a vocational expert's testimony, in this case, the

vocational expert identified only one "past relevant job" which was at the "sedentary level." Nothing in the record indicates that this job was performed by Plaintiff within the past fifteen years. The Court concludes that the record does not constitute substantial evidence to support the decision of the ALJ. On remand, the Commissioner should determine, first, in accordance with Henrie, whether Plaintiff can perform her past relevant work. If Plaintiff cannot, the ALJ should proceed to Step Five.

RECOMMENDATION

The Magistrate Judge recommends that the District Court reverse and remand this case to permit the Commissioner to properly conduct a Step Four inquiry. If the Commissioner concludes that Plaintiff is disabled at Step Four, the Commissioner should proceed to Step Five.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar that party from appealing any of the factual or legal findings in this Report and

Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 5 day of March 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 9th Day of March, 1998.

C Portillo, Deputy Clerk.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No. 97CV1066H(M)
NEAL H. CORNETT,	)	
Defendant.	)	

DATE 3-9-98

DEFAULT JUDGMENT

This matter comes on for consideration this 5TH day of March, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Neal H. Cornett, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Neal H. Cornett, acknowledged receipt of Summons and Complaint on December 6, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Neal H. Cornett, for the principal amount of $1,975.70, plus accrued interest of $1,184.62, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EMAD "EDDIE" ALDADA,

Plaintiff,

v.

UNITED STATES OF AMERICA, ex. rel., THOMAS CONSTANTINE, Chief Administrator of the Drug Enforcement Association,

Defendant.

ENTERED ON DOCKET

DATE 3-9-98

Case No. 97-CV-365-H

FILED

MAR 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant's motion to dismiss (Docket # 5). The Court held a status hearing in this matter on March 5, 1998. Plaintiff filed this action seeking a declaration that the requirement of posting of a bond in order to contest administrative forfeiture proceedings is unlawful and that administrative forfeiture proceeding are unlawful. The Court heard argument from the parties on May 7, 1997 regarding Plaintiff's Application for Temporary Restraining Order and Preliminary Injunction (Docket # 2). The Court denied the application for a temporary restraining order and preliminary injunction by order filed May 8, 1997 (Docket # 3).

Defendant has filed a motion to dismiss based upon two contentions. First, Plaintiff has failed to serve Defendant as required by the Federal Rules of Civil Procedure. Second, Plaintiff has now posted the required bond of which he complains in this action. Moreover, Plaintiff's complaints regarding administrative forfeitures are moot in light of the fact that the forfeiture at issue here is now the subject of judicial forfeiture proceedings. See United States of America v. The Sum of One Hundred Thirty-Eight Thousand One Hundred Fifty Dollars ($138,150), No. 97-cv-689-H (N.D. Okla. July 28, 1997).

The Court finds that the instant action should be dismissed without prejudice because Plaintiff has failed to serve Defendant properly as required under the Federal Rules of Civil

Procedure. At the hearing on March 5, 1998, Plaintiff agreed that dismissal was appropriate in this case because Plaintiff is now able to challenge the forfeiture at issue here through the judicial forfeiture initiated by the United States. See United States of America v. The Sum of One Hundred Thirty-Eight Thousand One Hundred Fifty Dollars ($138,150), No. 97-cv-689-H (N.D. Okla. July 28, 1997).

Accordingly, Defendant's motion to dismiss (Docket # 5) is hereby granted and this action is dismissed without prejudice.

IT IS SO ORDERED.

This 5th day of March, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BANK ONE, DAYTON, N.A.,

Plaintiff,

v.

MIAMI TIRE SERVICE, INC.; CARL R. MOSELEY and CAROLYN K. MOSELEY, individually, and doing business as Moseley Leasing,

Defendants.

ENTERED ON DOCKET
DATE 3-9-98

Case No. 96-CV-456-H

FILED
MAR 6 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the status report filed with the Court on February 26, 1998. A judgment in this matter against Defendant Miami Tire Service, Inc. was entered by the Court on August 21, 1996. Defendants Carl R. Moseley and Carolyn K. Moseley have also filed a petition in bankruptcy. On August 21, 1996, the Court ordered the parties to notify the Court within ten days after a decision by the Bankruptcy Court of any discharge by Defendants. Plaintiff recently notified the Court that Defendants Carl R. Moseley and Carolyn K. Moseley were discharged in Chapter 7 bankruptcy on June 26, 1997.

Since a judgment has been entered against Defendant Miami Tire Service, Inc. and since Defendants Carl and Carolyn Moseley have received a discharge of debts in bankruptcy, the Court hereby orders this case to be terminated and stricken from the docket.

IT IS SO ORDERED.

This 5th day of March, 1998.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 6 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Darrell A. Allison,

Defendant.

Civil Action No. 97CV787H(M)

ENTERED ON DOCKET
DATE MAR 09 1998

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 6th day of March, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of March, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Darrell A. Allison, 102 Payne Street, Claremore, OK 74017-8130.

Sue B. Aldridge

Sue B. Aldridge
Financial Litigation Agent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MILLS CUSTOM ROOF TRUSS, INC.,

Plaintiff,

v.

COMMERCIAL UNION INSURANCE COMPANY, a Massachusetts Corporation,

Defendant.

ENTERED ON DOCKET

DATE MAR 09 1998

Case No. 97-CV-1025-K

FILED

MAR 09 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Plaintiff's Motion to Remand. This action for breach of insurance contract and bad faith was originally filed on October 24, 1996 in the District Court of Oklahoma, Creek County. On November 4, 1997, the plaintiff moved to amend the original pleading by increasing the amount of damages. The Defendant filed a Notice of Removal on November 21, 1997 based on diversity of citizenship. Plaintiff moved to remand on December 17, 1997 under the authority of 28 U.S.C.A. § 1447 (c).

Both parties agree that 28 U.S.C.A. § 1446 (b) bars the removal of cases on the basis of diversity jurisdiction, conferred by section 1332, more than one year after commencement of the action. However, defendant argues that the plaintiff in this case has manipulated the litigation to prevent the removal of this case to federal court and that this Court should prevent this type of abuse.

The original petition identified damages "in excess of $10,000.00 but less than $50,000.00." The amended petition, filed one year and ten days after the original, identifies "damages in excess of $10,000.00 without any limitation." Defendant claims that, despite its

(14)

efforts, the plaintiff refused to respond to defendant's repeated requests to identify and quantify damages until ten days past the statutory limitation for removal.

The plaintiff also contends that the defendant did not file for removal within 30 days of receiving knowledge the case was removable as required by 28 U.S.C.A. § 1446 (b). The plaintiff claims the letter dated March 20, 1997 from his attorney, John Gladd to the defense attorney, Richard Glasgow, offering settlement for "non-contractual injuries" in the amount of $50,000.00 put the defendant on notice that the amount in controversy exceeds $50,000.00.

Plaintiff's third argument for remand is based on the fact that the defendant filed two motions in state court the day before filing its Notice of Removal. The plaintiff contends that the filing of these motions, in effect, waived the defendant's right to removal.

The language of 28 U.S.C.A. § 1446 (b) is clear. It plainly prohibits the removal on diversity grounds of a case commenced in state court more than a year prior to the notice of removal. The Supreme Court interpreted this statute strictly in Caterpillar v. Lewis, 117 S. Ct. 467, 472 (1996) by finding that "[i]n a case not originally removable, a defendant who receives a pleading or other paper indicating the post-commencement satisfaction of federal jurisdiction requirements -- for example, by reason of the dismissal of a nondiverse party -- may remove the case to federal court within 30 days of receiving such information. *No case, however, may be removed to federal court based on diversity of citizenship 'more than 1 year after commencement of the action.'*" Id. (citing 28 U.S.C.A. § 1446 (b))(emphasis added). The Tenth Circuit has taken the position that "removal statutes are to be strictly construed, and all doubts are to be resolved against removal." Fayen v. Foundation Reserve Insurance Co., 683 F.2d 331 (10th Cir. 1982)(citing Shamrock Oil and Gas v. Sheets, 313 U.S. 100 (1941) and Greenshields v. Warren Petroleum, 248 F.2d 61, 65 (10th Cir. 1957)).

The parties, in support of their respective positions, point out that while some courts have construed the one-year limitation strictly, ("the statutory language is crystal-clear, and federal judges do not sit as superlegislators to amend or repeal the work of Congress," Perhats Associates, Inc., v. Fasco Industries, Inc., 843 F. Supp. 424, 425 (N.D. Ill 1994)), other courts have asserted that there could be circumstances so blatant and manipulative as to justify an equitable departure from the one-year rule in order to prevent "potential abuse of the rule, the effect of which will be to undermine the very purpose behind federal diversity jurisdiction." Kite v. Richard Wolf Medical Instruments Corp., 761 F. Supp. 597 (S.D. Ind. 1989).

In arguing against any sort of equitable departure, plaintiff relies upon the "notice" purportedly provided to defense counsel by the March 20, 1997 letter from plaintiff's counsel seeking settlement of non-contractual issues in the amount of $50,000. In response, defendant contends that since the letter was not "filed" it does not constitute appropriate notice, but defendant also discusses the "jurisdictional amount" of $50,000. The parties may be unaware that on January 17, 1997, the jurisdictional amount for purposes of diversity jurisdiction was raised to $75,000. Accordingly, the March 20, 1997, could not have provided adequate notice that the case was properly removable.

However, the Court need not address the one-year limitation because another basis for remand, not discussed by the parties, exists. In Laughlin v. K-Mart, 50 F.3d 871 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995), the Tenth Circuit discussed the propriety of jurisdiction when a case was removed to federal court based upon a state court petition which sought damages for each of two claims "in excess of $10,000". The court held that the removing defendant had failed to meet its burden of setting forth the "underlying facts" which would support the assertion that the jurisdictional amount was satisfied. Id. at 873. Laughlin has been interpreted to mean that

"[i]f it is not facially apparent from plaintiff's complaint that the claims exceed $75,000, the removing attorney may support federal jurisdiction by setting forth the facts in controversy--preferably in the removal notice, but sometimes by affidavit--that support a finding of the requisite amount in controversy." Honeycutt v. Dillard's, Inc., 1997 WL 819730 (D.Kan.). Here, no such statement of facts appears in the notice of removal or by affidavit. Indeed, the notice of removal merely states in conclusory fashion that the amount in controversy exceeds $50,000, the now-superseded jurisdictional amount. Thus, even apart from Laughlin, the removal petition fails on its own terms to properly invoke this Court's jurisdiction.

It is true that the petition in this case contains a claim for punitive damages, but the Laughlin standard has been held to apply even in such a circumstance. See Martin v. Missouri Pacific R. Co., 932 F.Supp. 264 (N.D.Okla.1996). The Court recognizes the awkward position in which this places a defense counsel seeking removal. However, under the strict Laughlin standard, this Court cannot assume that the jurisdictional amount is exceeded, simply because the phrase "punitive damages" appears in the state court petition. Sufficient facts must appear in the removal petition from which an appropriate estimate of potential damages can be ascertained.

Plaintiff in this case has requested costs and expenses, including attorney fees incurred as a result of the defendant's time-barred removal pursuant to 28 U.S.C. § 1447 (c). Such an award is to be made at the Court's discretion and in making such a determination "the key factor is the propriety of the defendant's removal." Excell, Inc., v. Sterling Boiler & Mechanical, Inc., 106 F. 3d 318, 322 (10th Cir. 1997)(citing Daleske v. Fairfield Communities, 17 F. 3d 321, 324 (10th Cir.(1994)). The Court denies the request. There was conflicting authority regarded application of the one-year limitation, and this Court ultimately chose to remand on an issue not raised by the parties.

It is the Order of the Court that the Plaintiff's Motion to Remand (#6) is hereby granted, but the plaintiff's request for attorney fees and costs is denied. Pursuant to 28 U.S.C. § 1447 (c), this action is hereby remanded to the District Court of Creek County. The Motion of the plaintiff for hearing (#13) is denied.

ORDERED this 4 day of March, 1998

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERRY WAYNE CLARK,

Plaintiff,

vs.

Case No. 97-CV-0018-B

SHERIFF STANLEY GLANZ, ex rel TULSA BOARD OF COUNTY COMMISSIONERS, B. JOHNSON, and D. CASEY, et. al.,

Defendants.

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 5 day of ~~February~~ March, 1998

Thomas R. Brett
United States District Judge

UO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOEL A. GRIESHABER, an individual,)
)
Plaintiff,)
)
vs.)
)
EDWARD J. FERRO, and BRENDA G. FERRO, d/b/a American Offshore, and AMERICAN OFFSHORE, INC., an Oklahoma corporation,)
)
Defendants.)

Case No. 97-C-496-E

O R D E R

Now before the Court is the Defendants' Combined Motion for Partial Summary Judgment and Motion to Dismiss (Docket #6) and Plaintiff's Motion for Summary Judgment on Defendant's Fraud Counterclaim (Docket # 10).

ON September 17, 1996, defendant Ed Ferro entered into a written contract to sell to plaintiff a 2600 Catamaran boat for a total purchase price of $38,706.00. The contract provided that plaintiff would be provided a credit of $23,796.00 for the trade in of his 1991 Rapid Craft, and the total amount due would therefore be $15,000. The Ship date for the boat was specified by the contract to be "April 15, 1997 (or sooner)."

In November of 1996, plaintiff, a resident of Woodbury, Minnesota, dropped off his trade-in, without a manufacturer's statement of origin, at defendant's place of business. Shortly thereafter, defendant sold the boat for $17,000. When defendant did see the manufacturer's statement of origin, apparently with a different year than expected, he refused to accept the boat as a

30

trade-in, and "purchased it back" from the person to whom he had sold it.

Plaintiff refused to accept the return of the trade-in boat, and sent a facsimile copy of a check for $15,000 with a letter stating, in part: "With this letter I am tendering my payment to you for Fifteen Thousand and no/100 ($15,000.00) dollars. A copy of my cashier check no. 141672 is attached. I am planning to travel to Oklahoma immediately upon confirmation from you that the boat is ready for pick-up." Plaintiff admits that he never forwarded the actual cashier check, and defendant admits that he did not deliver the new boat.

Plaintiff sued defendant for breach of contract, alleging damages in the amount of $37,000.00; conversion of the new boat, alleging damages in the amount of $52,000.00 with punitive damages in the amount of $500,000.00; and violation of the Oklahoma Consumer Protection Act alleging damages in the amount of $37.000.00 plus a $2,000.00 civil penalty. Defendant filed a motion for summary judgment on the conversion claim, arguing that plaintiff had no right in the new boat upon which to base a claim of conversion because plaintiff had, at most, tendered a **copy** of a cashier's check for the amount owed on the boat. Defendant then argues that the case should be dismissed because, once the conversion claim is disposed of, plaintiff does not meet the $75,000.00 jurisdictional amount required by 28 U.S.C. §1332 in diversity cases. Defendant also argues that the claim under the Oklahoma Consumer Protection Act is not supported by the facts and

that Brenda Ferro should be dismissed because she is not an owner of American Offshore, but asserts that these arguments need not be reached if the Court grants the Motion with respect to the conversion claim and the jurisdictional amount.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The tort of conversion consists of wrongful exercise of dominion over another's personal property in denial of or inconsistent with his rights therein. Steenbergen v. First Federal Savings and Loan of Chickasha, 753 P.2d 1330, 1332 (Okla. 1988). In

this case, it is undisputed that plaintiff sent only a facsimile copy of the $15,000 check. The question then, is whether tender of the copy of the check is sufficient to grant a personal interest in the new boat that would give rise to a conversion claim. Put differently, did plaintiff have a right to possession of the boat upon tender of a copy of a $15,000 check?

Plaintiff argues that he acquired property rights in the new boat because he tendered the balance due under the contract. Tender is "an unconditional offer by a debtor or obligor to pay another, in current coin of the realm, a sum not less than the amount then due on a specified debt or obligation." Davidson v. Rogers, 471 P.2d 455, 458 (Okla. 1970). Under these undisputed facts, the Court must conclude that a tender sufficient to grant a personal interest in the new boat did not occur. Defendant's motion for summary judgment on the conversion claim is granted.

The Court must next address whether the disposition of the conversion claim requires dismissal of plaintiff's case for failure to meet the $75,000.00 jurisdictional amount. Plaintiff, relying on Watson v. Blankinship, 20 F.3d 383, 387 (10th Cir. 1994), argues that his good faith belief in bringing his claims is sufficient to maintain jurisdiction. That Court stated:

> [T]he amount in controversy requirement is determined at the time the complaint was filed. Klepper v. First American Bank, 916 F.2d 337, 340 (6th Cir.); Emland Builders, Inc. v. Shea, 359 F.2d 927, 929 (10th Cir.). Just because the court dismisses certain claims, which reduce the amount of recovery, or the jury does not find plaintiff is entitled to the required amount, does not necessarily destroy jurisdiction or prove that the plaintiff acted in bad faith. St. Paul, 303 U.S. at 292, 58 S.Ct. At 591; Klepper, 916 F.2d at 340; City of Bolder

> v. Snyder, 396 F.2d 853, 856 (10th Cir.). "A distinction must be made, however, between subsequent events that change the amount in controversy and subsequent revelations that, in fact, the required amount was or was not in controversy at the commencement of the action." Jones v. Knox Exploration Corp., 2 F.3d 181, 183 (6th Cir.)
>
> If at trial, evidence or lack thereof shows that these Appellees did not possess a good faith belief that they were entitled to the proper minimum jurisdictional amount "and that [the] claim was therefore colorable for the purpose of conferring jurisdiction, the suit must be dismissed" for lack of subject matter jurisdiction. Boulder, 396 F.2d at 856. "[W]here `the "proofs" adduced at trial conclusively show that the plaintiff never has a claim even arguably within the [required] range,' a diversity action must be dismissed." Jones, 2 F.3d at 183(quoting Jiminez Puig v. Avis Rent-A-Car System, 574 F.2d 37, 39 (1st Cir.)).

In Watson, the claim that caused plaintiff to meet the jurisdictional amount was a bad faith claim for punitive damages. The trial court found that because of the punitive damages, the claim could very possibly exceed the jurisdictional amount, and the plaintiff appealed on, among other things, the jurisdictional issue. Both sides argued the evidence that supported their position on the bad faith claim. The Court of Appeals held that it was not error to find that there was jurisdiction, and stated: "At the time the pleadings were filed, we agree with the district court that it appeared that Appellees had a good faith belief that they were entitled to punitive damages; it could not be proven to a legal certainty that they were not entitled to them." Watson, 20 F.3d 388.

On those facts, Watson is distinguishable from the present case. In this case, plaintiff knew, at the time of filing the complaint, that he had not tendered payment in full for the new

boat, thereby creating a personal interest upon which a conversion, and therefore a punitive damage, claim could be based. Here, it could be proven, to a legal certainty, at the time the Complaint was filed, that there was no punitive damage claim.

Plaintiff also argues that the Defendant's counterclaim for fraud can be included in determining whether the jurisdicitonal amount was met. This ignores the plain wording of Defendant's answer. The counterclaim was pled in the alternative if the claim was not dismissed for lack of subject matter jurisdiction.

Defendant's Motion for Summary Judgment on the Conversion Claim (docket #6) is granted. Accordingly, this case is dismissed for lack of subject matter jurisdiction. Plaintiff's Motion for Summary Judgment on Defendant's Fraud Counterclaim (docket #10) is denied as moot.

SO ORDERED this 5TH day of MARCH, 1998.

JAMES O. ELLISON, SENIOR JUDGE

FILED

MAR - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 97CV922 B
	)	
Jacqueline D. Williams,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE MAR 06 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 5th day of March, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Jacqueline D. Williams, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jacqueline D. Williams, was served with Summons and Complaint on Niovember 18, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jacqueline D. Williams, for the principal amount of $750.74, plus accrued interest of $212.95, plus administrative charges in the amount of $13.08, plus interest thereafter at the rate of 8 percent

per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.407 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/sba

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANNY HAROLD ASHTON,)
)
Petitioner,)
)
vs.) No. 96-C-1045-B
)
EDWARD EVANS, Warden,)
)
Respondent.)

ORDER

The Court has for decision Respondent's motion to dismiss Petitioner's petition for writ of habeas corpus (docket #8) pursuant to 28 U.S.C. §2254. Petitioner responded thereto by filing his motion to strike/overrule Respondent's motion to dismiss (docket #10).

The Petitioner, Danny H. Ashton, is an inmate in the custody of the Oklahoma Department of Corrections. He was charged in Creek County, Oklahoma District Court, Case No. CRF-92-280 with Possession of Marijuana with Intent to Distribute, Unlawful Possession of a Controlled Drug, Unlawful Possession of Paraphernalia and Feloniously Carrying a Firearm. (Respondent's Ex. A). The Plaintiff was found guilty at a jury trial and sentencing was delayed until a jury trial on the issue of Petitioner's competency regarding sentencing could occur. A jury trial on the issue of competency was held on September 13, 1993, Petitioner found competent, and was thereafter sentenced on that date to twenty years on Count I, ten years on Count II, and one year on Count III; said sentences to run concurrently.

The Petitioner filed a direct appeal but failed to raise the instant issue. In Petitioner's motion to strike/overrule Respondent's motion to dismiss at page 4, he states:

> "The only issue the Petitioner can bring at this point is the issue of competency to stand trial waived by counsel under 12 O.S. § 591 in a claim that Petitioner's incompetency allowed counsels to be ineffective, denying and depriving the Petitioner of due process and the suppression of exculpatory and favorable evidence requiring relief from the Judgements [sic] and Sentences imposed in the District Court."

By way of post-conviction relief, Petitioner has not raised this issue in the District Court in and for Creek County, Oklahoma, or before the Oklahoma Court of Criminal Appeals. The record indicates Petitioner has been filing a series of applications for habeas corpus in the District Court in and for Creek County joining improper defendants, instead of appropriate proceeding by way of application for post-conviction relief. (Respondent's Ex. B). These various applications have been properly denied under the applicable Oklahoma state habeas corpus rules. (Respondent's Ex. B, at page 2).

The burden is on the Petitioner to demonstrate that he has exhausted his remedies in state court. Clonce v. Presley, 640 F.2d 271, 273 (10th Cir. 1981). The Supreme Court has previously held that habeas petitions that contain unexhausted claims must be dismissed. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed. 379, 390 (1982). The Petitioner has failed to demonstrate that he has exhausted his remedies and the record reveals Petitioner has not previously presented the issue by post-conviction relief to either the District Court in and for Creek County, Oklahoma, or the Oklahoma Court of Criminal Appeals.

Title 28 U.S.C. § 2254(b) and (c) provide that a petitioner must exhaust his state court

remedies before being permitted to seek federal habeas corpus relief.

Exceptions to the exhaustion requirement exist if there is no opportunity to obtain redress in the state courts, or if the petitioner would be procedurally barred in the state court or if exhaustion would be futile. Duckworth v. Serrano, 454 U.S. 1, 3, 102 S.Ct. 18, 70 L.Ed.2d 1, 4 (1981); White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640, 659 n. 1 (1991). None of the exceptions are applicable here because the avenue of properly proceeding by way of application for post-conviction relief in the state court is available.

Thus, the motion to dismiss of the Respondent (docket #8) is hereby sustained due to Petitioner's failure to properly exhaust his state court remedies.

DATED this 5th day of March, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAR 06 1998

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 97CV1077H(M)
	)	
John H. Kame,	)	
	)	
Defendant.	)	

FILED
MAR 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 5TH day of MARCH, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, John H. Kame, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, John H. Kame, was served with Summons and Complaint on January 22, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, John H. Kame, for the principal amount of $1,275.00, plus accrued interest of $1,559.68, plus administrative charges in the amount of $87.00, plus interest thereafter at the rate of 7 percent per annum until

(6)

judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/sba

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA *ex rel.* WILLIAM I. KOCH and WILLIAM A. PRESLEY,

Plaintiffs,

v.

KOCH INDUSTRIES, INC., *et al.*,

Defendants.

Case No. 91-CV-763-K(J)

REPORT AND RECOMMENDATION

Now before the Court is "Plaintiffs' Motion for Leave to File Second Amended Complaint." [Doc. No. 191]. Oral argument on Plaintiffs' motion was heard from all parties, including the United States, at a February 18, 1998 status conference. For the reasons discussed below, the undersigned recommends that Plaintiffs' motion be **GRANTED**.

I. INTRODUCTION

The proposed Second Amended Complaint, attached as Exhibit "A" to Plaintiffs' motion, would do the following three things:

1. Delete certain allegations and Koch entities that Plaintiffs' believe are no longer necessary. Defendants do not object to this proposed amendment.

2. Articulate additional procedural facts. Defendants do not object to this proposed amendment.

(247)

3. Refine and further articulate Plaintiffs' claim that Defendants have violated the False Clams Act ("FCA") by knowingly underpaying oil and gas royalties to the government.

   a. As to the underpayment of oil royalties, Plaintiffs wish to add a specific allegation relating to the improper recording of gravity measurements. Defendants do not object to this proposed amendment.

   b. As to the underpayment of gas royalties, Plaintiffs wish to add the allegations in ¶¶ 56(c)-(e) of the proposed Second Amended Complaint. Defendants object to this proposed amendment.

Thus, the only issue before the Court is whether Plaintiffs should be permitted in this lawsuit to seek recovery based on the allegations in ¶¶ 56(c)-(e) of Plaintiffs' proposed Second Amended Complaint.

II. COUNT II OF PLAINTIFFS' AMENDED COMPLAINT AND COUNT II OF PLAINTIFFS' PROPOSED SECOND AMENDED COMPLAINT STATE IDENTICAL "CLAIMS FOR RELIEF" UNDER FED. R. CIV. P. 8(a). NEVERTHELESS, RULE 9(b)'s PARTICULARITY REQUIREMENT IS SATISFIED DIFFERENTLY IN COUNT II OF EACH COMPLAINT.

Count II of the Amended Complaint and Count II of the proposed Second Amended Complaint both state a "claim for relief" against Defendants for violating the False Claims Act by knowingly making, using, and causing to be made or used false records and statements to conceal or decrease Defendants' and other entities' obligation to pay or transmit money to the United States Government in exchange for natural gas products. See 31 U.S.C. § 3729(a)(7). In other words, the "claim for relief" asserted in Count II of the proposed Second Amended Complaint is identical to the "claim for relief" asserted in Count II of the Amended Complaint. Count II of both complaints asserts a claim for relief based on Defendants' alleged violation of the FCA

in connection with Defendants' purchase of natural gas products from federal and Indian leases. See Fed. R. Civ. P. 8(a) (defining a claim for relief).

If Plaintiffs only had to comply with Rule 8, an amendment to their Amended Complaint would not be required for them to recover damages or penalties based on the allegations in ¶¶ 56(c)-(e) of their proposed Second Amended Complaint. Rule 8 is, however, not the only rule applicable in a False Claims Act case. Rule 9(b) requires that the circumstances underlying or supporting an "averment of fraud" be "stated with particularity." See Fed. R. Civ. P. 9(b). Claims for relief based on violations of the FCA are "averments of fraud." Therefore, the circumstances underlying or supporting an alleged violation of the FCA must be stated in the complaint with particularity. See Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476-77 (2nd Cir. 1995) (collecting and discussing cases which apply Rule 9(b) to FCA cases).

To satisfy Rule 9(b)'s particularity requirement with regard to their Amended Complaint, Plaintiffs identified the following specific instances in which Defendants allegedly violated the FCA: (1) false integration of gas meter charts; (2) siphoning off gas products without paying for them; (3) tampering with gas meter recording pins, ink and orifice plates; (4) intentionally miscalibrating gas meters; (5) understating the BTU value of gas; and (6) falsely recording the amount of non-natural gas substances in the gas. See Amended Complaint, Doc. No. 26, ¶¶ 64(a)-(h). With their proposed Second Amended Complaint, Plaintiffs have dropped items (3)-(6) and they have alleged three new specific violations of the FCA: (1) disguising a 2¢/gallon marketing fee as an allowable fractionation fee, (2) improperly deducting $1.65/barrel from the

price paid for natural gasoline, and (3) improperly imposing a $2.24/barrel trucking charge on condensate. See Proposed Second Amended Complaint, ¶¶ 56(a)-(e).

If Plaintiffs wish to recover damages or penalties based on the allegations in ¶¶ 56(c)-(e) of their proposed Second Amended Complaint, Rule 9(b) requires those specific allegations to be in Plaintiffs' complaint. The allegations in ¶¶ 56(c)-(e) of the proposed Second Amended Complaint are not in Plaintiffs' Amended Complaint. Plaintiffs must, therefore, amend their Amended Complaint to add the specific allegations in ¶¶ 56(c)-(e). Plaintiffs must have leave from this Court to amend their Amended Complaint because Defendants have filed an answer to the Amended Complaint. See Fed. R. Civ. P. 15(a).

III. PLAINTIFFS' PROPOSED AMENDMENT IS AUTHORIZED BY FED. R. CIV. P. 15(a).

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). According to the United States Supreme Court, Rule 15(a)'s mandate is to be heeded. See Foman v. Davis, 371 U.S. 178, 182 (1962). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.'" Id.

The only ground seriously advanced by Defendants as a reason to deny Plaintiffs' motion for leave to amend is Foman's "futility of amendment" ground. Defendants argue that based on the statutes defining FCA jurisdiction, Plaintiffs' proposed amendment would destroy the Court's subject matter jurisdiction. Defendants argue, therefore, that allowing Plaintiffs' proposed amendment would be futile. For the reasons discussed below, the undersigned does not agree that Plaintiffs' proposed amendment would be futile.

A. PLAINTIFFS ARE NOT GUILTY OF BAD FAITH, DILATORY MOTIVE OR UNDUE DELAY.

Plaintiffs admit that the information supporting the allegations in ¶¶ 56(c)-(e) of the proposed Second Amended Complaint was obtained by Plaintiffs through discovery in this case. Plaintiffs allege, and Defendants do not dispute, that discovery on preliminary aspects of the allegations in ¶¶ 56(c)-(e) was completed on April 2, 1997. Plaintiffs' motion for leave to amend was filed April 15, 1997, less than two weeks after initial discovery on the allegations in ¶¶ 56(c)-(e) was complete. Plaintiffs' motion was also filed within the time set for amendment to pleadings. See Doc. No. 173. When Plaintiffs' motion was filed, there were 13 months of discovery left and 18 months until trial. Plaintiffs are not, therefore, guilty of undue delay.

Defendants have been aware that Plaintiffs were investigating the allegations in ¶¶ 56(c)-(e) of the proposed Second Amended Complaint and that Plaintiffs were contemplating amending their Amended Complaint since the January 18, 1996 status conference held by the Court. See Doc. No. 121. Defendants were also aware of the nature of the allegations in ¶¶ 56(c)-(e) at least by the time Plaintiffs filed their Motion

to Compel Production of Gas "Sales-Side" Documents in May 1997. See Doc. No. 122. Defendants cannot, therefore, be surprised in any way by the fact that Plaintiffs are seeking leave to amend their Amended Complaint to add the allegations in ¶¶ 56(c)-(e) of the proposed Second Amended Complaint.

B. DEFENDANTS WILL NOT SUFFER UNDUE PREJUDICE.

In May 1996, the undersigned granted Plaintiffs' motion to compel sales-side documents and allowed limited discovery with regard to the allegations which are currently being asserted in ¶¶ 56(c)-(e). See Doc. No. 133.[1/] The only potential prejudice to Defendants is the need for additional discovery and investigation relating to the allegations in ¶¶ 56(c)-(e) at this late stage of the litigation. There are currently less than three months of discovery left in this case. However, at the time Plaintiffs' motion for leave to amend was filed, there were 13 months of discovery left. The reason not much discovery time is left is not because Plaintiffs filed their motion too close to the discovery cutoff, but because the Court was unable to promptly rule on Plaintiffs' motion. Plaintiffs should not suffer because of the Court's delay.

Based on the parties' representations at the February 18, 1998 hearing, the addition of ¶¶ 56(c)-(e) to this lawsuit would not generate much in the way of additional formal discovery. From Defendants' perspective, most of the work would

---

[1/] While the undersigned's prior order did allow discovery regarding sales-side activity, including the activity described in ¶¶ 56(c)-(e), that order specifically refused to express an opinion as to whether the Amended Complaint adequately stated a claim with regard to inappropriate activity occurring on the sales side. See Doc. No. 133.

consist of an internal investigation in an effort to prepare a defense to the allegations in ¶¶ 56(c)-(e).

The trial of this case is currently set for October 19, 1998 and Judge Terry Kern has set aside a significant block of trial time to try this case. Looking ahead, Defendants are concerned that they do not have enough time to complete all of the tasks remaining in this case without impacting the October trial date. To address these concerns, Defendants announced their intention at the February 18, 1998 hearing to file a motion to modify the Scheduling Order. Due to the significant trial block set aside by Judge Kern, Defendants want the issue addressed earlier, rather than later. Since the hearing, Defendants have filed their motion. See Doc. No. 246. To the extent addition of ¶¶ 56(c)-(e) to this lawsuit will increase Defendants' investigation and/or discovery burdens, those additional burdens should be addressed by Defendants as part of their motion to modify the Scheduling Order.

C. PERMITTING PLAINTIFFS TO AMEND THEIR AMENDED COMPLAINT WOULD NOT BE FUTILE.

Defendants allege that Plaintiffs' proposed amendment is futile because the amendment will destroy the Court's subject matter jurisdiction under 31 U.S.C. § 3730(e). Leave to amend should be denied based on futility only when it is absolutely clear that plaintiff will be unable to demonstrate that subject matter jurisdiction exists. As will be discussed below, the undersigned does not agree that the Court's subject matter jurisdiction is impacted to the degree that Defendants argue. The degree to

which the Court's jurisdiction is effected is not absolutely clear and should not be resolved on a motion for leave to amend.

IV. PLAINTIFFS' PROPOSED AMENDMENT IS NOT FUTILE BECAUSE IT IS NOT ABSOLUTELY CLEAR THAT PLAINTIFFS WILL HAVE TO QUALIFY AS ORIGINAL SOURCES OF ANY NEW PUBLICLY DISCLOSED ALLEGATIONS OR TRANSACTIONS.

Defendants argue that allowing Plaintiffs to amend the Amended Complaint to add ¶¶ 56(c)-(e) of the proposed Second Amended Complaint would destroy this Court's subject matter jurisdiction because Plaintiffs cannot qualify as original sources under 31 U.S.C. § 3730(e)(4)(B). Plaintiffs argue that amendment would not destroy the Court's subject mater jurisdiction because they are not required to qualify as original sources under § 3730(e)(4)(B).

Section 3730(e)(4) of the FCA provides as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A) & (B).

"[T]he jurisdictional inquiry under 31 U.S.C. § 3730(e)(4)(A) involves four questions: (1) whether the alleged 'public disclosure' contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made 'public' within the meaning of the False Claims Act; (3) whether the relator's complaint is 'based upon' this 'public disclosure'; and, if so, (4) whether the relator qualifies as an 'original source' under section 3730(e)(4)(B). If the court were to answer 'no' to any of the first three questions, its inquiry ends at that point and the qui tam action proceeds. The last inquiry, whether the relator is an original source, is necessary only if the answers to each of the first three questions is 'yes,' indicating the relator's complaint is based upon a specified public disclosure." United States *ex rel.* Fine v. MK-Ferguson, 99 F.3d 1538, 1544 (10th Cir. 1996).

A. THE TENTH CIRCUIT'S DECISION IN PRECISION.

In Precision, the Tenth Circuit found that Plaintiffs' Amended Complaint is based in part on publicly disclosed allegations. United States *ex rel.* Precision Co. v. Koch Industries, Inc., 971 F.2d 548, 553-554 (10th Cir. 1992). The Tenth Circuit found that allegations substantially identical to those in the Amended Complaint had been publicly disclosed in three prior lawsuits filed by William I. Koch and in a public hearing before the Senate Select Committee on Indian Affairs. Id. As a result of the Tenth Circuit's decision in Precision, Plaintiffs have had to demonstrate that they are the "original sources" of the public disclosures identified by the Tenth Circuit in Precision. See 31 U.S.C. § 3730(e)(4)(B). Determining whether Plaintiffs' are original sources of the publicly disclosed allegations identified by the Tenth Circuit in Precision has

occupied much of this Court's time and has been the subject of several other motions and orders. See, e.g., Doc. Nos. 99, 175 & 201.

In Precision, the Tenth Circuit held that "a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the 'original source' jurisdictional requirement." Precision, 971 F.2d at 553. Relying on this language, Defendants argue that because some of the allegations in Plaintiffs' complaint are based on publicly disclosed allegations, Plaintiffs must qualify as "original sources" for all allegations in their complaint, even those allegations not based on publicly disclosed allegations. Defendants argument is not consistent with either the language of § 3730(e)(4) or Tenth Circuit precedent. See United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538 (10th Cir. 1996); and United States *ex rel.* Fine v. Sandia Corp., 70 F.3d 568 (10th Cir. 1995).

The Tenth Circuit's holdings in Precision, Sandia and MK-Ferguson stand for the proposition that if any of the allegations in an FCA relator's complaint are "based on" publicly disclosed allegations within the meaning of § 3730(e)(4)(A), then the relator must qualify as on original source of the **publicly disclosed allegations**. That is, the relator must have direct and independent knowledge of the information on which the publicly disclosed allegations are based. 31 U.S.C. § 3730(e)(4)(B). See MK-Ferguson, 99 F.3d at 1548 (dismissing relator's FCA compliant because he did not have direct and independent knowledge of the information on which certain "publicly disclosed" allegations were based). Neither the language of § 3730(e)(4) nor Tenth Circuit precedent requires a relator to qualify as an original source with regard to

allegations in his complaint that are not based on a publicly disclosed allegation. A relator need only establish that he is an original source of those publicly disclosed allegations on which some portion of his complaint is based. Because some of the allegations in Plaintiffs' Amended Complaint are based on publicly disclosed allegations, Plaintiffs must qualify as original sources of those publicly disclosed allegations.

Although there is currently a motion to reconsider pending, the Court has held that Plaintiffs are the original sources of the public disclosures identified by the Tenth Circuit in Precision. See Doc. Nos. 99 & 156. To re-trigger § 3730(e)(4)(B)'s original source requirement, Defendants must demonstrate that the allegations in ¶¶ 56(c)-(e) implicate publicly disclosed allegations in addition to those identified by the Tenth Circuit in Precision. Defendants argue that additional publicly disclosed allegations are implicated by ¶¶ 56(c)-(e) and that those allegations were made public through the discovery process in this case and through certain Mineral Management Service ("MMS") audits. Therefore, under § 3730(e)(4)(A), the Court must first determine if an allegation or transaction, in addition to those identified by the Tenth Circuit in Precision, has been disclosed in one of the following sources: (1) a criminal, civil, or administrative hearing; (2) a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or (3) the news media. See United States *ex rel.* Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1004 (10th Cir. 1996). The only sources potentially relevant to Plaintiffs' motion for leave to amend are a civil

hearing (as to discovery materials) and an administrative audit (as to the MMS Audits). Each source will be discussed separately below.

B. CIVIL HEARING: THE PRODUCTION AND USE OF DISCOVERY MATERIALS IN THIS CASE DOES NOT CONSTITUTE A PUBLIC DISCLOSURE FOR PURPOSES OF 31 U.S.C. § 3730(e)(4)(A).

The parties agree that Plaintiffs obtained the information supporting the allegations in ¶¶ 56(c)-(e) by using the discovery processes of the Federal Rules of Civil Procedure in this case (hereinafter "the discovery materials").[2/] For purposes of Plaintiffs' motion for leave to amend only, the undersigned will assume that the discovery materials contain "allegations or transactions" within the meaning of § 3730(e)(4)(A).[3/] The undersigned will also assume that the disclosure of information during the discovery phase of a case is equivalent to the disclosure of information during a "civil hearing."[4/] Despite these assumptions, the undersigned finds that the

---

[2/] From the record, it is not clear how Plaintiffs obtained copies of the MMS Audits referred to by Defendants. The MMS Audits will be discussed separately, and they are not to be considered part of the "discovery materials" discussed in this section. See Discussion *infra* at IV(C).

[3/] See, e.g., United States *ex rel.* Dunleavy v. County of Delaware, 123 F.3d 734, 740-41 (3d Cir. 1997); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994); and United States *ex rel.* Mikes v. Straus, 931 F. Supp. 248, 254 (S.D.N.Y. 1996) (all distinguishing between the public disclosure of "information" and "allegations or transactions"). See also Discussion *infra* at IV(C)(2).

[4/] See, e.g., United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154-57 (3d Cir. 1991) (holding that a "civil hearing" for purposes of § 3730(e)(4)(A) encompasses the full range of proceedings in a civil lawsuit). The Tenth Circuit has not addressed the scope of the term "civil hearing" in § 3730(e)(4)(A).

discovery materials have not been publicly disclosed as that term is used in § 3730(e)(4)(A).

Defendants argue that for purposes of § 3730(e)(4)(A) a public disclosure of information occurs any time someone answers a discovery request. As support for this proposition, Defendants rely primarily on United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149 (3d Cir. 1991). The Third Circuit's holding in Stinson does support Defendants' argument that discovery responses are public disclosures under § 3730(e)(4)(A). However, the Third Circuit's holding in Stinson has been directly rejected by the Tenth Circuit. See United States *ex rel.* Ramseyer v. Century Health Care Corp., 90 F.3d 1514 (10th Cir. 1996).

Stinson is a False Claims Act case. The plaintiff/relator in Stinson is a law firm and that law firm represented T. Armlon Leonard in a prior civil case involving an automobile accident. Mr. Leonard was covered by his employer's group insurance plan and the plan was carried by Provident Life and Accident Insurance Company ("Provident"). While representing Mr. Leonard, Mr. Leonard's lawyers formed a suspicion that Provident's claim-processing practice violated the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") "in which Congress shifted primary liability for benefit claims of people covered both by Medicare and employer group health plans (working seniors) from Medicare to the private group plan." Stinson, 944 F.2d at 1151. Through discovery in the Leonard case, Mr. Leonard's lawyers obtained two Provident memos suggesting that insurance companies other than Provident, including Prudential Insurance Company ("Prudential"), were also violating TEFRA. The memos

were never filed with the court in the Leonard case and the court in the Leonard case did not enter a protective order limiting dissemination of the memos. Id.

After obtaining the memos in the Leonard case, the law firm representing Mr. Leonard sued Prudential under the False Claims Act. Id. Prudential moved to dismiss, arguing that the court lacked subject matter jurisdiction under § 3730(e)(4) because the law firm could not qualify as an original source of the memos. The district court dismissed the case, holding that (1) the memos contained allegations or transactions, (2) the memos had been publicly disclosed when they were obtained by the law firm through civil discovery, and (3) that the law firm did not qualify as an original source of the memos. Stinson, 944 F.2d at 1152. The law firm appealed, arguing that production of the memos during discovery in the Leonard case did not amount to a public disclosure under § 3730(e)(4)(A).

In a two to one decision, the Third Circuit affirmed the district court, holding that the public's potential "access to civil discovery that is not subject to a protective order leads us to conclude that information received as a result of such discovery should be deemed based on a 'public disclosure' for purposes of the FCA jurisdictional bar." Stinson, 944 F.2d at 1159-60. The dissent, citing the Supreme Court's decision in Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984), argued that pretrial discovery is not generally a public event. Stinson, 944 F.2d at 1170 (Scirica, J. dissenting). Judge Scirica argued that courts should "focus on actual disclosure, rather than the general potentiality for public access to civil litigation," and he would have held "that no public disclosure occurred when [the law firm] obtained the

Provident memoranda through a discovery inquiry, just as if [the law firm] had obtained the information through an independent investigation prior to the Leonard litigation." Id. at 1171.

The following passage from the Tenth Circuit's opinion in Ramseyer establishes that the Tenth Circuit has endorsed Judge Scirica's interpretation of public disclosure under § 3730(e)(4)(A) and rejected the interpretation of the Stinson majority.

> Since 1986, when Congress amended the FCA to add the public disclosure bar, the Tenth Circuit has not had the occasion to address directly what constitutes 'public disclosure' for purposes of section 3730(e)(4)(A). See United States *ex rel.* Fine v. MK-Ferguson Co., 861 F. Supp. 1544, 1550 (D.N.M. 1994) (noting that '[t]he Tenth Circuit is basically silent as to the extent to which given information must have been disclosed so a[s] to bar qui tam actions'). Moreover, our sister circuits are divided on the question whether theoretical or potential accessibility -- as opposed to actual disclosure -- of allegations or transactions is sufficient to bar a qui tam suit that is based upon such information. Compare United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991) (information exchanged between private parties through discovery but not filed with the court is 'potentially accessible to the public' and thus is publicly disclosed) with United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519-20 (9th Cir. 1995) (holding that 'public disclosure' means actual disclosure rather than potential availability), petition for cert. filed, 64 U.S.L.W. 3593 (U.S. Feb. 15, 1996) (No. 95-1340) and United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 652-53 (D.C. Cir. 1994) (expressing doubt that documents revealed during discovery but not filed in court were publicly disclosed, and rejecting view that 'public disclosure' includes information that 'is only theoretically available upon the public's request'). **We agree with the District of Columbia and Ninth Circuits that 'public disclosure' signifies more than the mere theoretical or potential availability of information.** **See also Stinson,**

> **944 F.2d at 1171 (Scirica, J., dissenting) ('I would focus on actual public disclosure, rather than the general potentiality for public access . . . .'). We believe that in order to be publicly disclosed, the allegations or transactions upon which a qui tam suit is based must have been made known to the public through some affirmative act of disclosure.**
>
> . . . .
>
> Thus, a report which is merely potentially discoverable -- such as through a Freedom of Information Act request, see Schumer, 63 F.3d at 1519-20 -- but not actually 'made known' to the public, does not come within the ambit of public disclosure. In order to bar a qui tam action under section 3730(e)(4)(A), the allegations or transactions upon which the suit is based must have been affirmatively disclosed to the public. MK-Ferguson Co., 861 F. Supp. at 1551; cf. Springfield Terminal Ry., 14 F.3d at 652 ('public disclosure' occurred when discovery materials not subject to protective order were filed with the court in public litigation).

United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519 (10th Cir. 1996) (emphasis added).[5/] See also United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538, 1544-46 (10th Cir. 1996) (reaffirming the holding in Ramseyer and holding that to bar qui tam suits because of the mere potential of public disclosure is contrary to the purposes of the FCA and recognizing that limitations imposed on dissemination of information, like a protective order, are relevant to determining if there has been a public disclosure). The undersigned finds that there is only one logical conclusion that can be drawn from the language of the Tenth

---

[5/] The undersigned is compelled to point out that none of the parties cited Ramseyer or discussed Ramseyer's endorsement of the Stinson dissent, despite the fact that Shepard's Federal Citations indicates that Ramseyer is critical of Stinson.

Circuit's holdings in Ramseyer and Fine. The answering of discovery requests is not a public disclosure *per se* under § 3730(e)(4)(A).

Ramseyer and Fine also demonstrate that the Tenth Circuit considers the filing of discovery materials and the existence of a protective order to be particularly relevant factors when evaluating whether discovery materials have been publicly disclosed. Defendants have not demonstrated that the discovery materials underlying the allegations in ¶¶ 56(c)-(e) of Plaintiffs' proposed Second Amended Complaint have been filed of record with the Court. Defendants' reliance on United States *ex rel.* Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993) is, therefore, misplaced. As the Tenth Circuit states in Ramseyer, Kreindler holds "that discovery materials filed in a court's public records file were thereby publicly disclosed . . . ." Ramseyer, 90 F.3d at 1519 n.3. In Ramseyer, the Tenth Circuit left open the question "whether documents placed in a public court file are thereby publicly disclosed . . . ." Id. Because the discovery materials at issue in this case have not been filed in the Court's public file, the undersigned will also leave that question for another day.

The Court has also entered two broad protective orders in this case. See Doc. Nos. 84 & 121. These protective orders significantly restrict the parties' right to disseminate discovery materials obtained in this case. This fact alone is sufficient to distinguish Stinson. The following language from the Stinson majority opinion demonstrates that the majority's holding is premised on the absence of a protective order in that case.

> We must assume from the absence of a protective order that the information disclosed in discovery is potentially accessible

> to the public. Stinson, 944 F.2d at 1158. In this case, we need not consider whether information subject to a protective order which is either advertently or inadvertently disclosed could be considered to be received pursuant to a 'public disclosure.' Id. Therefore, disclosure of discovery material to a party which is not under any court imposed limitation as to its use is a public disclosure under the FCA. Id. To recapitulate, the presumption under Rule 5(d) of public access to civil discovery that is not subject to a protective order leads us to conclude that information received as a result of such discovery should be deemed based on a 'public disclosure' for purposes of the FCA jurisdictional bar. Id. at 1159-60.

Given the two broad protective orders in this case, the undersigned is not convinced that the majority in Stinson would have reached the same result under the facts of this case.

The undersigned also finds the Stinson majority's holding distinguishable on its facts. In Stinson, attorneys representing a client in Case A obtained documents through discovery in Case A. Those attorneys then took the documents from Case A and used them to file Case B, a False Claims Act case. Thus, the Stinson majority's holding was that information disclosed in Case A and used in Case B is publicly disclosed in Case A. Here, Plaintiffs discovered the information during discovery in this case and they want to use that information in this case, not a separate case. Recognizing this distinction, the Ninth Circuit has held that evidence discovered for the first time during the discovery phase of a *qui tam* suit is not barred from use in that suit by section 3730(e)(4)(A). Wang v. FMC Corp., 975 F.2d 1412, 1416 (9th Cir. 1992). See also, United States v. Northrop Corp., 5 F.3d 407, 411-12 (9th Cir. 1993).

For all of the reasons discussed above, the undersigned finds that the discovery materials in this case have not been publicly disclosed for purposes of 31 U.S.C. § 3730(e)(4)(A).

C. ADMINISTRATIVE AUDITS: THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO DETERMINE IF THE MMS AUDITS TRIGGER 31 U.S.C. § 3730(e)(4)(A)'s ORIGINAL SOURCE INQUIRY.

In all likelihood, Plaintiffs will not be able to qualify as original sources of the MMS Audits. Plaintiffs had no direct involvement whatsoever with the preparation of the MMS Audits. Thus, if Plaintiffs must qualify as original sources of the MMS Audits, this Court will loose subject mater jurisdiction because Plaintiffs will be unable to do so. There is, however, insufficient evidence to determine if the MMS Audits have been publicly disclosed, if they contain "allegations or transactions," or if any of the allegations in the Second Amended Complaint are "based on" allegations or transactions in the MMS Audits.

1. "Public Disclosure"

The FCA specifically lists "administrative audits" as one of the types of sources that can trigger § 3730(e)(4)(A)'s public disclosure jurisdictional bar. The MMS Audits in this case qualify as administrative audits. To trigger the public disclosure jurisdictional bar, however, there must be a public disclosure as defined by the Tenth Circuit in Ramseyer, 90 F.3d at 1519. The administrative audit must be made known to the public through some affirmative act of disclosure. Id. Thus, an administrative audit is not publicly disclosed where it is merely potentially discoverable, such as

through a Freedom of Information Act request, but not actually made known to the public.

For the reasons discussed above, production of the MMS Audits in response to a discovery request in this case is not a public disclosure under § 3730(e)(4)(A).[6/] Pursuant to Ramseyer, the fact that the MMS Audits are in MMS files, subject to inspection by the public, is also not a enough to amount to a public disclosure under § 3730(e)(4)(A). Currently, there is no evidence in the record regard to suggest that the MMS Audits have been affirmatively been made known to the public as required by Ramseyer to trigger § 3730(e)(4)(A)'s public disclosure jurisdictional bar.

2. "Allegations or Transactions"

Courts sometimes speak loosely about § 3730(e)(4)(A) barring FCA claims based on public information. However, a close reading of § 3730(e)(4)(A) demonstrates that the FCA bars claims based on publicly disclosed "allegations or transactions," not "information." See, e.g., United States *ex rel.* Mikes v. Straus, 931 F. Supp. 248, 254-58 (S.D.N.Y. 1996); United States *ex rel.* Dunleavy v. County of Delaware, 123 F.3d 734, 740-44 (3d Cir. 1997); Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473-74 (9th Cir. 1996); Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992).

To date, the District of Columbia Circuit has provided the most detailed definition of "allegation or transaction." "On the basis of plain meaning, and at the

---

6/ See Discussion *supra* at IV(B).

risk of belabored illustration, if X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed." United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994). The D.C. Circuit goes on to explain that an allegation of fraud requires two elements: "a misrepresented state of facts and a true state of facts." Id. at 655. If we inject this idea into the above formula, the variables take on the following labels: X (misrepresented state of facts) + Y (true state of facts) = Z (allegation of fraud). To publicly disclose an allegation of fraud, both X and Y must be disclosed.

Because the MMS Audits are not in the record, the undersigned is unable to determine if the MMS Audits contain "allegations" within the meaning of § 3730(e)(4)(A). There is also no evidence that the MMS Audits in any way deal with the marketing fees, trucking charges or improper deductions that are the subject of ¶¶ 56(c)-(e) of Plaintiffs' proposed Second Amended Complaint.

3. "Based On"

Even if the MMS Audits do contain "allegations or transactions" within the meaning of § 3730(e)(4)(A), the Court must find that the allegations in ¶¶ 56(c)-(e) are "based on" those allegations or transactions that are in the MMS Audits. In a series of cases, the Tenth Circuit has defined when an allegation in an FCA complaint is "based on" an allegation already in the public domain. An allegation in an FCA complaint is based on a publicly disclosed allegation, such as an allegation in an MMS

audit, when substantial identity exists between the publicly disclosed allegation and the allegation in the FCA complaint. United States *ex rel.* Precision Co. v. Koch Industries, Inc., 971 F.2d 548, 553-554 (10th Cir. 1992); MK-Ferguson, 99 F.3d at 1546; United States *ex rel.* Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995). Because the MMS Audits are not in the record, the undersigned is unable to compare any allegations or transactions in the MMS Audits with the allegations in ¶¶ 56(c)-(e) to determine if they are substantially identical.

Based on the record before the Court, there is insufficient evidence to determine if Plaintiffs will have to qualify as original sources of the MMS Audits. Specifically, there is insufficient evidence for the undersigned to determine (1) if the MMS Audits have been "publicly disclosed," (2) if the MMS Audits contain "allegations or transactions," or (3) if allegations in the Second Amended Complaint are "based on" "allegations or transactions" in the MMS Audits. There is, therefore, no current basis to deny Plaintiffs' motion for leave to amend. Once Plaintiffs' Second Amended Complaint is filed, Defendants may file an appropriate dispositive motion to address the effect of the MMS Audits on the Court's subject matter jurisdiction.

V. PLAINTIFFS' PROPOSED AMENDMENT IS NOT BARRED BY 31 U.S.C. § 3730(b)(2).

Defendants argue that Plaintiffs are barred from filing their Second Amended Complaint because Plaintiffs did not comply with § 3730(b)(2)'s procedural[7/] requirements. Section 3730(b)(2) provides as follows:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule [4(i)] of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. § 3730(b)(2).[8/] If the government decides to intervene, it is in control of the lawsuit. If, however, the government chooses not to intervene, then the plaintiff/relator is in charge of the case. 31 U.S.C. § 3730(b)(4).

The Tenth Circuit has defined the purpose of § 3230(b)(2) as follows: (1) to provide the Government with enough information to determine whether it should

---

[7/] Defendants incorrectly characterize § 3730(b)(2) as a jurisdictional requirement. Section 3730(e) is the jurisdictional provision of the FCA. Section 3730(b) simply outlines various procedural requirements for FCA claims brought by private parties. See Mikes, 931 F. Supp. at 258-60.

[8/] Section 3730(b)(2) refers to the filing of a "complaint" *in camera* and under seal without service on defendant. Defendants in this case fail to explain how § 3730(b)(2)'s "complaint" language should be applied to a "motion" for leave to file an amended complaint. Nothing in § 3730(b)(2) refers to the filing of a "motion." Because the undersigned finds no prejudice to the government under the facts of this case, the undersigned also will not address this issue.

intervene and take over prosecution of the action, and (2) to allow the Government to determine whether there is a basis to defeat the Court's jurisdiction over the *qui tam* portion of the action so that the government will not have to share any recovery with the *qui tam* plaintiff. United States *ex rel.* Woodard v. Country View Care Center, Inc., 797 F.2d 888, 892 (10th Cir. 1986).

At the February 18, 1998 hearing, the United States was represented by Gordon Jones, an attorney from the Department of Justice who is assigned to this case. According to Mr. Jones, he has regular contact with Plaintiffs and he receives copies of all pleadings filed in the case. See 31 U.S.C. § 3730(c)(3) (giving the government the right to receive copies of all pleadings and to intervene at any time upon a showing of good cause). Plaintiffs also keep Mr. Jones appraised of the general state of discovery in the case. Plaintiffs, prior to filing their motion for leave to amend, met with Mr. Jones and went over the proposed Second Amended Complaint in detail with Mr. Jones. Mr. Jones reviewed the proposed Second Amended Complaint and the information on which the proposed amendments were based and determined on behalf of the government not to intervene in this case. Plaintiffs then filed their motion for leave to file the Second Amended Complaint and served a copy of that motion and the proposed complaint on the government.

At the hearing, Mr. Gordon announced that the government had no objection to the granting of Plaintiffs' motion for leave to amend. Based on Mr. Jones' representations at the February 18, 1998 hearing, the undersigned finds no prejudice to the government and the government claims none in connection with Plaintiffs'

alleged failure to comply with § 3730(b)(2). Prior to the filing of the motion for leave to amend, the purposes underlying § 3730(b)(2) have been achieved. The government had enough information to determine whether it should intervene and take over prosecution of this action, and the government had an adequate opportunity to determine whether it wished to challenge the Court's jurisdiction over the *qui tam* portion of the action. See Mikes, 931 F. Supp. at 258-260 (the court extensively discusses § 3730(b)(2) and refuses to dismiss an amended complaint where there is no prejudice to the government). See also United States *re rel.* Walle v. Martin Marietta Corp., Civ. A. No. 92-3677, 1994 WL 518307, at *2 (E.D. La. Sept. 21, 1994). The undersigned, therefore, declines Defendants' invitation to require unnecessary procedural gestures by Plaintiffs.

RECOMMENDATION

Plaintiffs' proposed Second Amended Complaint is authorized by Fed. R. Civ. P. 15(a). Plaintiffs are not guilty of undue delay and it is not absolutely clear that the Court will lack subject matter jurisdiction over the proposed Second Amended Complaint. Plaintiffs are also not barred from filing the Second Amended Complaint for not complying with the procedural requirements in 31 U.S.C. § 3730(b)(2). Plaintiffs' motion for leave to amend should, therefore, be **GRANTED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the mater to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 5 day of March 1998.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the ____ Day of _____, 19____.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY W. CLARK,

Plaintiff,

v.

ERLANGER TUBULAR CORPORATION,

Defendant.

Case No. 96-CV-1062-H

JUDGMENT

This matter came before the Court for a trial by jury on March 2-4, 1998. On March 4, 1998, the jury returned its verdict finding Defendant Erlanger Tubular Corporation liable on Plaintiff Timothy Clark's claim of negligence. The jury found that the percentage of negligence for Plaintiff's contributory negligence was 30% and that the percentage of negligence for Defendant's negligence was 70%. The jury awarded Plaintiff $170,000 in compensatory damages. The Court hereby reduces the amount of the jury award by 30%, the amount of Plaintiff's contributory negligence, resulting in a reduction of $51,000.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the amount of $119,000.

IT IS SO ORDERED.

This 4TH day of March, 1998.

Sven Erik Holmes
United States District Judge

(31)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SANDRA K. BILBREY,
SSN: 321-44-8044,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 96-CV-1183-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintif. Dated this 4th day of MARCH, 1998.

Frank H McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

17

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SANDRA K. BILBREY
321-44-8044 Plaintiff,

vs.

KENNETH S. APFEL,[1]
Commissioner,
Social Security Administration,

Defendant.

Case No. 96-CV-1183-M

ORDER

Plaintiff, Sandra K. Bilbrey, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92

---

[1] Kenneth S.. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

[2] Plaintiff's January 2, 1992 (protectively filed) application for disability benefits was denied and was affirmed on reconsideration. Following hearing before an Administrative Law Judge ("ALJ"), the application for benefits was denied. Plaintiff appealed the decision to the district court which, upon Defendant's motion, remanded the case. Following remand another hearing was held and by decision dated August 26, 1996, the ALJ entered the findings that are the subject of this appeal. No written exceptions were presented to the Appeals Council therefore the August 26, 1996 decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.984(d), 416.1484(d).

16

F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services,* 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was 52 years old at the time of the hearing. She has a sixth grade education with past relevant work experience as a nurse's aide, cook, warehouse worker, cleaner, and press operator. She claims to be unable to work as a result of her mental condition, possible degenerative disc disease, hip pain, and residuals from multiple abdominal surgeries. The ALJ determined that Plaintiff is capable of performing her past relevant work as a cook, cleaning and warehouse person. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) improperly evaluated

Plaintiff's mental condition; and (2) failed to properly develop the record and evaluate her hip pain. The Court finds that the ALJ properly conducted his evaluation and that the denial decision is supported by substantial evidence.

Psychiatrist, Dr. Inbody, and psychologist, Dr. Gordon, both evaluated Plaintiff. Dr. Inbody's January 1993 report states that Plaintiff was currently upset about her daughter's death in November of 1992. He noted that Plaintiff was oriented in all spheres, did not appear to be particularly anxious, and did not show any signs of clinical depression. There were no disturbances in attention and concentration and judgment was felt to be intact. He diagnosed "Adjustment disorder with mixed mood disturbances, involving both anxiety and depression, moderate, not being treated." [R. 128]. According to Dr. Gordon, in April 1993, Plaintiff's social-adaptive behavior seemed to be within normal limits; the organization of her thought processes was coherent and her memory, both long and short-term, seemed to be adequate. Based on testing, Dr. Gordon found Plaintiff to be functioning in the borderline range of mental retardation.

Drs. Inbody and Gordon each completed a "Medical Assessment of Ability to do Work-Related Activities (Mental)" form. The form requires the doctor to check blocks which correspond to ratings of the claimant's ability to: adjust to a job; understand, remember and carry out job instructions; and make personal and social adjustments. The claimant's ability is rated as: unlimited/very good; good; fair; and poor/none. The form also asks the examiner to describe any limitations and include the medical/clinical findings that support each of the assessments. [R. 217]. In

boldface type and capital letters, the examiner is informed: "IT IS IMPORTANT THAT YOU RELATE PARTICULAR MEDICAL FINDINGS TO ANY ASSESSED LIMITATION IN CAPACITY; THE USEFULNESS OF YOUR ASSESSMENT DEPENDS ON THE EXTENT TO WHICH YOU DO THIS." [R. 217].

Dr. Inbody checked boxes indicating that plaintiff had a "fair" ability to (1) follow work rules; (2) relate to co-workers; (3) deal with public; (4) use judgment/the public; (5) interact with supervisors; (6) deal with work stresses; (7) maintain attention/concentration; (8) understand, remember and carryout detailed, but not complex, job instructions; (9) behave in an emotionally stable manner; relate predictably in social situations; and (10) demonstrate reliability. Plaintiff was rated as having a "good" ability to: function independently; follow simple job instructions; and maintain personal appearance. [R. 131-33]. Dr. Inbody's descriptive comments relate:

> "Pt. has some long-term anxiety and depression which have been handled is past with mild tranquilizers. Most of her problems are physical--i.e. bilateral deafness using 2 hearing aides and history of repeated partial intestinal obstruction with surgeries in past. She also has only 7th gr. education with minimal reading and spelling skills."

[R. 131].

Dr. Gordon checked boxes rating plaintiff as "fair" in her ability to: (1) relate to co-workers; (2) deal with public; (3) use judgment with the public; (4) interact with supervisors; (5) deal with work stresses; (6) function independently; and (7) understand, remember, and carry out detailed, but not complex, job instructions. He found no or "poor" ability to understand, remember and carry out complex job

instructions, and "good" ability to: (1) follow work rules; (2) maintain attention/concentration; (3) follow simple job instructions; (4) maintain personal appearance; (5) behave in an emotionally stable manner; (6) relate predictably in social situations; and (7) demonstrate reliability. Dr. Gordon provided no comments to correlate his ratings to clinical/medical findings. [R. 217-219].

Plaintiff argues that Tenth Circuit case law mandates a finding that the ALJ's analysis of her mental condition was inadequate. In *Cruse v. U.S. Dept. of Health & Human Services*, 49 F.3d 614 (10th Cir 1995), the Court was critical of the use of the "Medical Assessment of Ability To Do Work-Related Activities (Mental)" form which was employed in this case by Drs. Inbody and Gordon. [R.131-33; 217-19]. The factors evaluated on the "Mental Assessment" form do not match the listing requirements which significantly limits their usefulness to the ALJ and the Court. Rather than evaluating the severity of a claimant's functional impairments using the same terms as found in the Social Security regulations, the "Mental Assessment" form employs the terms: unlimited/very good; good; fair; and poor or none. The terms have specialized meanings defined on the form. [R. 131, 217]. Of particular concern, is the term "fair."

Describing a functional ability as "fair" would seem to imply that no disabling impairment exists. However, on the "Mental Assessment" form "fair" is defined to mean: "Ability to function in this area is seriously limited but not precluded." *Id.* The *Cruse* Court noted that "seriously limited but not precluded" is essentially the same

as the listing requirements' definition of the term "marked". *Cruse*, 49 F.3d at 618. "Marked" is defined at § 12.00 C:

> Where "marked" is used as a standard for measuring the degree of limitation, it means more than moderate, but less than extreme. A marked limitation may arise when several activities or functions are impaired or even where only one is impaired, so long as the degree of limitation is such as to seriously interfere with the ability to function independently, appropriately and effectively.

The Court concluded that use of the term "fair" as it is defined on the Medical Assessment form is evidence of *dis*ability. *Cruse*, 49 F.3d at 618. However, in addition to the Mental Assessment form, the Court in *Cruse* also reviewed the doctors' notes which the court found clearly supported a finding of a severe mental impairment. *Id.*, at 616, 618-19.

According to Plaintiff, the ALJ failed to apply *Cruse* and if *Cruse* were applied, the number of "fair" ratings would require a finding of disability. The Court disagrees. *Cruse* does not hold that "fair" ratings necessarily equate to disability. The *Cruse* Court held that "fair" ratings on the Mental Assessment form are *evidence* of disability. *Id.*, at 618. That evidence, like all other evidence, must be evaluated on consideration of the record as a whole.

The ALJ did not specifically discuss Dr. Inbody's ratings but noted that Dr. Inbody's assessment showed there were "no signs of clinical depression or anxiety and the claimant was alert and oriented in all spheres, responsive, and had no psychotic disorders. Her attention and concentration were within normal limits." [R. 273]. These narrative comments do not support the level of impairment indicated by

the "fair" ratings. Likewise, Dr. Gordon's "fair" ratings are not supported by his clinical findings. He recorded Plaintiff had normal social-adaptive behavior, coherent thought, and adequate memory, although she functioned at a borderline level of mental retardation. The ALJ made note of Dr. Gordon's opinion that Plaintiff "would have serious deficits in understanding, remembering, and carrying out detailed and complex job instructions, but would have "good" ability with simple instructions." [R. 273]. The ALJ outlined Plaintiff's activities, such as housekeeping, cooking, shopping, sewing, crocheting and noted that she had worked for many years with the same deficits of mental retardation and depressive symptoms, but cited only physical reasons for leaving any job. [R. 274]. Based on a combination of factors contained in the narrative portions of the mental evaluations and evidence of Plaintiff's daily activities, the ALJ concluded that Plaintiff was limited to performance of simple tasks. [R. 273-74; 279].

Unlike the *Cruse* case, here the ALJ did not interpret the "fair" ratings as evidence of Plaintiff's ability to perform work. Instead, the ALJ gave more weight to the narrative comments made by the examiners, and credited the "fair" ratings to the extent they were supported by the recorded clinical findings and the record as a whole, including Plaintiff's description of her activities. This Court concludes that the ALJ applied the correct legal standard in evaluating Plaintiff's mental claim and that substantial evidence supports the ALJ's determination that Plaintiff's mental impairment compromised her ability to do work to the extent that she is limited to the performance of simple tasks.

Plaintiff argues that the case should be reversed and remanded because the ALJ failed to develop the record concerning her hip pain. The Tenth Circuit recently discussed at some length the ALJ's duty "to ensure that an adequate record is developed . . . consistent with the issues raised." *Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (quotation omitted). In particular *Hawkins* addressed the question: "How much evidence must a claimant adduce in order to raise an issue requiring further investigation?" The Court instructed that some objective evidence in the record must suggest the existence of a condition which could have a material impact on the disability decision requiring further investigation. However, isolated and unsupported comments by the claimant will not suffice to raise the issue. The claimant must in some fashion raise the issue, which on its face must be substantial. The claimant has the burden to make sure the record contains evidence to suggest a reasonable possibility that a severe impairment exists. Once that burden is satisfied, it becomes the ALJ's burden to investigate further. *Id.* However, the Court stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." *Id.* at 1167-68. It is appropriate for the ALJ to require counsel to identify issues requiring further development.

Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of*

Health and Human Servs., 13 F.3d 359, 360-61 (10th Cir. 1993). If there was significant additional information relevant to Plaintiff's ability to do work, it was the obligation of Plaintiff and her counsel to bring that information to the attention of the ALJ. The *Hawkins* Court said that an "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment." 113 F.3d at 1168. Applying this precept, the Court finds that the ALJ exercised reasonable good judgment with respect to development of the record, in part because Plaintiff's daily activities demonstrate an ability to work within the RFC level found by the ALJ.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

SO ORDERED this 4th day of March, 1998.

Frank H. McCarthy

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 3

HOMEWARD BOUND, INC. et al.,

Plaintiffs,

vs.

THE HISSOM MEMORIAL CENTER, et al.,

Defendants.

Case No. 85-C-437-E

ENTERED ON DOCKET
MAR 04
DATE

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on Februa 6, 1998, for an award of attorney fees and expenses in accordance with the December 2 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees a expenses in the amount of $42,966.76.

IT IS THEREFORE ORDERED that the Department of Human Services, t Oklahoma Health Care Authority and the Department of Rehabilitation Services are ea jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, f attorney fees and expenses in the amount of $42,966.76, and a judgment in the amount $42,966.76 is hereby granted on this day.

823

ORDERED this 30 day of March, 1998.

HONORABLE JAMES O. ELLISON
United States District Court

Louis W. Bullock, OBA #1305
Patricia W. Bullock, OBA #9569
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001

- and -

Frank Laski
Judith Gran
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
125 South Ninth Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

ATTORNEYS FOR PLAINTIFFS

Mark Lawton Jones, OBA #4788
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL
4545 North Lincoln, Suite 260
Oklahoma City, OK 73105-3498

Lynn S. Rambo-Jones, OBA #4785
Deputy General Counsel
OKLAHOMA HEALTH CARE
AUTHORITY
4545 North Lincoln, Suite 124
Oklahoma City, OK 73105
(405) 530-3439

ATTORNEYS FOR DEFENDANTS

RCH:tln

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 3 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TULSA EXPEDITING, INC., an Oklahoma Corporation,

Plaintiff,

vs.

FREIGHTLINER CORPORATION, an Indiana corporation, and CUMMINS ENGINE COMPANY, INC., a Delaware corporation,

Defendants.

Case No.: 96 CV 1111B

ENTERED ON DOCKET

DATE MAR 04 1998

ORDER

The motion of Freightliner Corporation to dismiss its cross claim against Cummins Engine Company, Inc., with prejudice being considered by the Court, the Court finds that the parties to the above captioned action have fully compromised and settled all claims. The Court finds that the motion of Freightliner Corporation should be sustained.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the cross claim of Freightliner Corporation against Cummins Engine Company, Inc., is hereby dismissed with prejudice.

Date this 27 day of Feb., 1998.

THOMAS R. BRETT,
UNITED STATES DISTRICT JUDGE

81

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LAYMON L. HARRIS,

Plaintiff,

vs.

STANLEY GLANZ, *et al.*,

Defendants.

CASE NO. 97-C-327-B

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 3rd day of ~~February~~ Mar, 1998

Thomas R. Brett
United States District Judge

42

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES M. AUSTIN, d/b/a MIKE AUSTIN,

Plaintiff,

vs.

Case No. 96-CV-985-C

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., STATE FARM LIFE INSURANCE CO., STATE FARM FIRE AND CASUALTY CO., and STATE FARM GENERAL INSURANCE CO.,

Defendants.

ORDER

Before the Court is the motion for attorney fees filed by the defendant State Farm. State Farm asserts that it is entitled to attorney fees as prevailing party under 12 O.S. § 936, which provides:

> In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

State Farm relies on Doyle v. Kelly, 801 P.2d 717 (Okla.1990), in interpreting § 936 to allow attorney fees in wrongful termination cases under an insurance agency contract for labor and services.

Plaintiff James Austin denies that State Farm has a right to an award of attorney fees under § 936. Plaintiff relies on Ferrell Construction Co. v. Russell Creek Coal Co., 645 P.2d 1005 (Okla. 1982), in arguing that his suit was for damages for breach of contract

19

to recover lost profits he claimed he would have made if permitted to perform the contract.

The issue presented is whether this case was instituted to recover "for labor or services" as contemplated under § 936. The Oklahoma Supreme Court has strictly construed the language of § 936 and limits it to actions brought to recover for labor and services rendered. In Russell v. Flanagan, 544 P.2d 1005 (Okla.1982), the court rejected an interpretation of § 936 which would authorize the courts to award attorney fees to the prevailing party in an action alleging injury that was merely "related to" a contract for labor and services. In Russell, the court denied an attorney fee award since the relief sought was damages for loss of anticipated profits.

This action centered on the parties' rights and responsibilities under the Agent's Agreement. Plaintiff argued that State Farm wrongfully terminated him in violation of the contractual provision which allowed the plaintiff to control his daily activities and to exercise independent judgment as to the time, place and manner of soliciting insurance. Defendant argued that under the Agent's Agreement, it retained the right to terminate the agreement at will and to set rules governing the agent's acceptance, renewal or rejection of risks and payment of losses. Plaintiff sought damages for the loss of his anticipated future profits under the legal theories of breach of the duty of good faith, violation of public policy, breach of fiduciary duty, constructive fraud, and prima facie tort. Plaintiff did not assert a claim of damages for either commissions earned or services rendered.

State Farm's reliance on Doyle v. Kelly, is misplaced. In Doyle, an award of attorney fees under § 936 was allowed based on an action for wrongful termination of a contract to collect commissions and bonus commissions earned for services rendered. See, Kay v.

Venezuelan Sun Oil Co, 806 P.2d 648, 652 (Okla.1991) (citing and interpreting Doyle v. Kelly). Clearly the subject case does not come within the holding of Doyle.

Accordingly, State Farms' motion for attorney fees in the sum of $148,842.50 is denied as unauthorized under 12 O.S. § 936.

IT IS SO ORDERED this 2nd day of March, 1998.

H. DALE COOK
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANGEL LENABURG, an individual

Plaintiff,

vs.

JOHN WOOLSLAYER, an individual, and WOOLSLAYER COMPANIES, INC., a corporation,

Defendants.

Case No. 97-CV-1051H(W)

ENTERED ON DOCKET

DATE 3-4-98

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41, F.R.Civ.P., the parties stipulate that Plaintiff's Complaint is hereby dismissed with prejudice because the parties have settled the case. All costs and attorney fees shall be borne by the parties respectively.

BOONE, SMITH, DAVIS, HURST & DICKMAN

Kimberly Lambert Love

Kimberly Lambert Love, OBA #10879
Mary L. Lohrke, OBA #15806
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4215

David W. Davis

David W. Davis
406 South Boulder, Suite 416
Tulsa, Oklahoma 74103

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 97CV1075K**
	)	
Kevin Wallace,	)	
	)	
Defendant.	)	

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 3, 1998 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Kevin Wallace**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 3rd day of March, 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By L Schreiber
Deputy Court Clerk for Phil Lombardi

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil No. 97CV1036 K (M**
	)	
Calvin Lomar Hill,	)	
	)	
Defendant.	)	

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 3, 1998 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Calvin Lomar Hill**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma, this 3rd day of March, 1998.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By L Schwelke
Deputy Court Clerk for Phil Lombardi

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ZIAC HILMI,

Plaintiff,

vs.

DISCOP COMPANY, Inc., a corporation in the state of Texas, formerly known as PROPERTY COMPANY OF AMERICA,

Defendants.

ENTERED ON DOCKET
DATE MAR 04 1998

Case No. 97-C-679-BU

FILED
MAR 3 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff, Ziac Hilmi, and pursuant to Fed. R. Civ. P. 41 (a)(1), hereby submits his stipulation of **Dismissal with Prejudice** in the above-referenced matter, and would state as follows:

- I -

Defendant, DISCOP Company, Inc. ("DISCOP"), has entered its appearance in this matter by and through the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, and its undersigned individual attorneys of record: Don Bingham, James R. Polan, and Rex Thompson.

- II -

Although DISCOP has denied any liability, it has not asserted any counterclaims, cross-claims, or third-party claims in this matter.

- III -

Pursuant to the Settlement Conference scheduled in this matter on February 12, 1998, the parties have come to an agreement, resolving any and all claims Plaintiff had against DISCOP and its related business entities.

- IV -

This Dismissal by Stipulation of Defendant is **with prejudice, and both parties agree that each is responsible for their own attorney fees and costs incurred in this matter.**

AGREED AND STIPULATED TO BY:

Katherine Waller, Attorney for Plaintiff

Don Bingham, Attorney for Defendant

James R. Polan, Attorney for Defendant

Rex W. Thompson, Attorney for Defendant

s:\sherry\jrp\discop\stip

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERTA CROWLEY,

Plaintiff,

vs.

MARRIOTT INTERNATIONAL CORPORATION, INC.,

Defendant.

Case No. 97-C-576-H

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Roberta Crowley, and the Defendant, Marriott International, Inc., jointly stipulate and agree that this case be dismissed with prejudice, each party to bear her or its own costs, expenses, and attorney's fees.

Attorney for Plaintiff

Paula R. Inman, OBA #10355
616 South Main - Suite 214
Tulsa, Oklahoma 74119
(918) 592-5400
(918) 585-2444 (fax)

Attorney for Defendant

David E. Strecker, OBA #8687
Robert C. Fries, OBA #16958
STRECKER & ASSOCIATES, P.C.
15 W. Sixth Street - Suite 1600
Tulsa, Oklahoma 74119
(918) 582-1716
(918) 582-1780 (fax)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEFFREY McCARVER,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL, Warden,)
)
Respondent.)

No. 97-CV-652-K

ORDER

Petitioner, a state inmate appearing *pro se*, paid the filing fee to commence this action pursuant to 28 U.S.C. § 2254. On July 25, 1997, the Court directed Respondent to answer the petition for writ of habeas corpus or file a dispositive motion. On August 25, 1997, Respondent filed a motion to dismiss the petition as time barred pursuant to the one-year statute of limitations imposed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act. (Docket #s 3 and 4). To date, Petitioner has not filed a response to the motion to dismiss.

However, on December 18, 1997, Petitioner filed his "motion to dismiss (without prejudice to re-filing) Rule 41(a)(1) FRCP" (Docket # 5). In his motion, Petitioner states that "the pleadings filed in 97-CV-652-K are fatally flawed, and for the petitioner to cure the defects in said filings, and adequately frame his arguments, it is necessary to request that said pleading be dismissed." Under the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss an action, as a matter of right, "without order of court, by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . ." Fed. R. Civ. P. 41(a)(1)(i). In this case, Respondent has neither answered, in

(6)

the form of a responsive pleading, nor filed a motion for summary judgment. Rule 41(a)(1)(i) is clear and unambiguous on its face and admits of no exceptions that call for the exercise of judicial discretion by any court. Therefore, the Court finds that Petitioner may voluntarily dismiss this action as a matter of right. The "motion to dismiss (without prejudice to re-filing)" is liberally construed as a Notice of Dismissal filed voluntarily pursuant to Fed. R. Civ. P. 41(a)(1)(i).

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's "motion to dismiss (without prejudice to re-filing)" (Docket #5) is construed as a voluntary Notice of Dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i) and this action is dismissed without prejudice. Any pending motion is denied as moot.

SO ORDERED THIS 2 day of March, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 2 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 97CV380 K
	)	
WAYNE LINTNER,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE MAR 03 1998

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 2nd day of ~~February~~ March, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11128
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of ~~February~~ March, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Wayne Lintner, P.O. Box 533, Pawhuska, OK 74056.

Janet M. Owen
Financial Litigation Agent

(10)

cb

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES C. SPINKS,

Plaintiff,

vs.

THE CITY OF TULSA *ex rel.* M. Susan Savage, Mayor and *ex rel.* Joe Williams, Darla Hall, David Patrick, Gary L. Watts, Sam Roop, Art Justis, Terry Doverspike, Vickie Cleveland, and Robert Gardner, City Councilors; TULSA METROPOLITAN AREA PLANNING COMMISSION *ex rel.* Gary Boyle, Gail Carnes, Jim Doherty, Bobbie Gray, Baker Horner, Brandon Jackson, Jerry Ledford, Fran Pace, Joe Westervelt, Robert Dick and Dwain Midget, Commissioners; INDIAN NATIONS COUNCIL OF GOVERNMENTS, *ex rel.* Jerry Lasker, its executive director; and CROWN CHASE, L.L.C., an Oklahoma limited liability company,

Defendants.

Case No. 98-CV-0124K (E)

DISMISSAL WITHOUT PREJUDICE

Plaintiff James C. Spinks, pursuant to Fed.R.Civ.P. 41(a)(1), hereby dismisses his Complaint against the named Defendants without prejudice as to refiling.

Respectfully submitted,

Tony W. Haynie (OBA No. 11097)
David H. Herrold (OBA No. 17053)
Gentra Abbey Sorem (OBA No. 10476)
of
CONNER & WINTERS,
A Professional Corporation
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344
(918) 586-5711; (918) 586-8547 *fax*

Attorneys for the Plaintiff JAMES C. SPINKS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICK I. CHAPMAN,

Plaintiff,

vs.

VINTAGE GAS, INC.; VINTAGE PIPELINE, INC.; and VINTAGE PETROLEUM, INC.,

Defendants.

Case No. 97-CV-662 (K)

ORDER

Upon the joint application of the parties, and in accordance with local Rule 41.0, the Court hereby directs the Clerk to close this action administratively, subject to reopening it for good cause.

DATED this 2 day of March, 1998.

UNITED STATES DISTRICT JUDGE

157819

19

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE MAR 03 1998
	)	
v.	)	**CIVIL ACTION NO. 97-CV-561-K(J)**
	)	
THE SUM OF SEVEN THOUSAND ONE HUNDRED SIXTY-SIX DOLLARS ($7,166.00) IN UNITED STATES CURRENCY,	)	
	)	
Defendant.	)	

FILED
IN OPEN COURT
MAR 2 - 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant United States Currency and all entities and/or persons interested in the defendant United States Currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 11th day of June, 1997, alleging that the defendant United States Currency is subject to forfeiture to the United States of America pursuant to 18 U.S.C. § 981, because it is currency that was involved in a transaction, or attempted transaction, in violation of 18 U.S.C. § 1956 (Money Laundering) or is property traceable to such property, and pursuant to 18 U.S.C. § 981(a)(1)(C), because it constitutes, or is derived from, proceeds traceable to a violation of 18 U.S.C. § 1344.

Warrant of Arrest and Notice In Rem was issued on the 17th day of June 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant United States Currency and for publication in the Northern

(9)

District of Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant United States Currency on August 1, 1997.

Karen L. Hart and Gary L. Hart were determined to be the only individuals with possible standing to file a claim to the defendant United States Currency, and, therefore the only individuals to be served with process in this action. Karen L. Hart was personally served on August 8, 1997, and Gary L. Hart was personally served on August 12, 1997.

All persons and/or entities interested in the defendant United States Currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant United States Currency, and no persons or entities have plead or otherwise defended in this suit as to said defendant United States Currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the defendant United States Currency and all persons and/or entities interested therein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant

United States Currency was located, on August 7, 14 and 21, 1997. Proof of Publication was filed September 25, 1997.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant United States Currency:

The Sum of Seven Thousand One Hundred Sixty-
Six Dollars ($7,166.00) In United States Currency

be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 2nd day of March, 1998.

TERRY C. KERN, CHIEF JUDGE OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SUBMITTED BY:

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\LPEADEN\FORFEITU\HART\DEFAULT.JUD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PERCY L. PALMER,

Plaintiff,

v.

MARVIN T. RUNYON, Postmaster General, United States Postal Service,

Defendant.

No. 98-CV-46-H

ORDER

This matter comes before the Court on Plaintiff's motion to dismiss. Plaintiff's case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 27th day of February, 1998.

Sven Erik Holmes
United States District Judge

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEANNA MARIE BESERRA,	
Plaintiff,	
v.	**Case No.97-C-112-H**
THE CIRCLE K CORPORATION, and/or CIRCLE K STORES, INC., a Texas CORPORATION,	
Defendant.	

ORDER TO DISMISS WITHOUT PREJUDICE

COMES ON for consideration before this Court on this 27TH day of FEBRUARY, 1998 the Motion to Dismiss the above entitled action filed herein by the Plaintiff, Deanna Marie Beserra. The Court having reviewed said Motion finds that the Motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Motion of the Plaintiff, Deanna Marie Beserra, is granted, and the above entitled action is hereby dismissed without prejudiced refiling.

JUDGE OF THE UNITED STATES DISTRICT COURT

C:\B\BESERRA\DISMISS.ORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RON DOUGHTY,

Plaintiff,

v.

DELAWARE COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant.

ENTERED ON DOCKET

DATE 3-3-98

Case No. 97-C-618-H

FILED

FEB 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the complaint filed by Plaintiff on July 1, 1997. No service has yet been obtained on Defendant. On February 13, 1998, the Court ordered Plaintiff to file a statement with the Court describing the good cause for failure to timely effect service. The Court further warned Plaintiff that if he did not demonstrate good cause, then his action would be dismissed without prejudice. Plaintiff did not respond to the Court's order.

Rule 4(m) of the Federal Rules of Civil Procedure, which governs time limits for service, states in pertinent part as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice of the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Thus, the Court first must determine whether Plaintiff has shown good cause for the failure to timely effect service. If so, the Court must give Plaintiff a mandatory extension of time. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). However, if Plaintiff fails to show good cause, the Court "must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service." Id.

The Court finds that Plaintiff has not demonstrated good cause for failure to effect service. No action has been taken in this case to effect service or to describe to the Court the reasons for failure to timely effect service. The Court further declines to grant a permissive extension of time in which to effect service. Accordingly, this case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 27TH day of February, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD R. NICHOLS, et al.,

Plaintiffs,

v.

G. DAVID GORDON, et al.,

Defendants.

ENTERED ON DOCKET

DATE 3-3-98

Case No. 95-C-1126-H

FILED

FEB 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on motions to dismiss the Second Amended Complaint by Defendant G. David Gordon (Docket # 114), by Defendants Joel Holt and Richard T. Clark (Docket # 115), and by Defendants George D. Gordon and Baggett, Gordon & Deison (Docket # 130).

The initial complaint in this case was filed on November 9, 1995, brought by eight plaintiffs against seventeen defendants, alleging violations of securities fraud laws. On June 13, 1997, the Court granted the motion of Defendants G. David Gordon and Henshaw, Klenda, Gordon & Getchell to dismiss the Amended Complaint without prejudice for failure to comply with Rule 9(b). On July 11, 1997, the two remaining Plaintiffs, Donald R. Nichols and Virginia Nichols, filed the Second Amended Complaint, the subject of the instant motions. Subsequently, Plaintiffs dismissed without prejudice claims arising out of Oklahoma law, resulting in the dismissal of counts one, five, six, and seven.

Thus, the remaining allegations in the Second Amended Complaint consist of count two and three (§§ 10(b) and 20(a) of the Securities Act of 1934), count four (Section 12(2) of the Securities Act of 1933), and count eight (breach of fiduciary duty). Defendants have moved for

dismissal, alleging that the Second Amended Complaint does not plead fraud with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. A hearing was held in this matter on February 27, 1998.

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

Rule 9(b) of the Federal Rules of Civil Procedure states in pertinent part as follows: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). The allegations of securities fraud in the instant case must conform to Rule 9(b)'s requirements. See Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 986 (10th Cir. 1992); Sears v. Likens, 912 F.2d 889, 892-93 (7th Cir. 1990).

The Court concludes that the instant motions are governed by the recent Tenth Circuit case of Schwartz v. Celestial Seasonings, Inc., 124 F.3d 1246 (10th Cir. 1997). Under Schwartz, to satisfy the particularity requirements in a securities fraud case, "a complaint must 'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'" Schwartz, 124 F.3d at 1252 (quoting Lawrence Nat'l Bank v. Edmonds, 924 F.2d 176, 180 (10th Cir. 1991)). The Tenth Circuit also has stated that "[i]dentifying the individual sources of statements is unnecessary when the fraud allegations arise from misstatements or omissions in group-published documents such as annual reports, which

presumably involve collective actions of corporate directors or officers." Id. at 1254 (citing Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1440 (9th Cir. 1987) (stating that "group published information" such as prospectuses and annual reports are presumed to be collective actions)). [1]

Plaintiffs have satisfied the Schwartz requirements in the instant case with respect to the Information Memorandum by alleging, as stated in the Second Amended Complaint, that Defendants were control persons of the various corporations and were responsible for the use of the Information Memorandum in connection with the sale of the securities at issue here. The Second Amended Complaint, however, does not describe Defendant George Gordon as such a control person and does not make any suggestion of action of behalf of Defendant Baggett, Gordon & Deison. See Second Amended Complaint ¶ 46. Accordingly, these parties are hereby dismissed from this action. Under Schwartz, the Second Amended Complaint also sufficiently alleges the time, place, and contents of the alleged misrepresentations and omissions. Finally, Defendants have conceded that Plaintiffs have pled with particularity the consequences of the alleged misrepresentations and omissions.

For the reasons set forth above, Defendant G. David Gordon's motion to dismiss (Docket # 114) is hereby denied. The motion to dismiss by Defendants Joel Holt and Richard T. Clark

---

[1] Defendants Holt and Clark argued at the hearing that Schwartz stands for the proposition that in order for the group-pleading doctrine to apply, a defendant must be an officer or director of the corporation. The Court rejects this argument since there is nothing in Schwartz that indicates that "collective actions" can occur only when a defendant is acting in the role of an officer or director.

(Docket # 115) is also hereby denied. Finally, the motion to dismiss by Defendants George D. Gordon and Baggett, Gordon & Deison (Docket # 130) is hereby granted.

IT IS SO ORDERED.

This 27TH day of February, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CATHY McNAMAR,
SSN: 442-48-7247,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 96-CV-1134-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 27th day of Feb., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELSIE HENRY, o/b/o Max Henry, deceased,	)	
Plaintiff,	)	
v.	)	**Case No. 96-C-955-M**
KENNETH S. APFEL, Commissioner, Social Security Administration,	)	
Defendant.	)	

ORDER

On November 14, 1998, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded this action to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), and defendant's response, the parties have stipulated that an award in the amount of $2,167.75 for attorney fees and $120.00 for costs for a total award of $2,287.75 for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of $2167.75 and costs of $120.00 for a total award of $2,287.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social

Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 27th day of ~~March~~ Feb. 1998.

Frank H. McCarthy

FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA AT TULSA

THRIFTY RENT-A-CAR SYSTEM, INC.

Plaintiff,

-vs- **Case No.: 98CV0075C(E)**

SERVICE LINKS INTERNATIONAL, INC., SUKHAKAR R. VADDI, NAGENDRA PRASAD KAZA and SATYA N. NALLAMOTHU,

Defendants.

NOTICE OF REMOVAL OF ALL CAUSES OF ACTION ASSERTED AGAINST ALL OF THE NAMED DEFENDANTS TO THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9027(a)

PLEASE TAKE NOTICE of the removal of all of the causes of action asserted against the defendants named in Thrifty Rent –A- Car System, Inc. vs. Service Links International, Inc. et al. ("Removed Action") to the United States Bankruptcy Court for the Western District of New York pursuant to a Notice of Removal filed with the Clerk of the United States Bankruptcy Court for the Western District of New York on February 26, 1998.

PARTIES FILING NOTICE OF REMOVAL:

Sudhakar R. Vaddi, Nagendra Prasad Kaza, Satya N. Nallamouthu and Service Links International, Inc. ("Removing Parties").

CLAIMS OR CAUSES OF ACTION REMOVED TO UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK:

All causes of action asserted against the Removing Parties.

FACTS UPON WHICH REMOVAL IS BASED:

The Removing Parties are defendants in an action commenced by Thrifty Rent –A- Car System, Inc. to recover monies claimed due by virtue of alleged guarantees from the Removing Parties in favor of Thrifty Rent-A-Car, System, Inc. The primary obligor is Service Links International of New York, Inc. ("DIP") which is a debtor in possession in a chapter 11 proceeding commenced in the United States Bankruptcy Court for the Western District of New York under the

caption of In Re Service Links International of New York, Inc. , Bankruptcy Case No.: 98-20223 on January 23, 1998.

The Removing Parties are listed as co-debtors in relationship to the debt owed by the DIP to Thrifty Rent-A-Car System, Inc. The Removed Action is related to the pending Chapter 11 proceeding in that the outcome of the Removed Action will alter the DIP's rights, liabilities, options or freedom of action, will effect the reorganization effort and impact the administration of the bankruptcy estate.

Upon removal the removed matters are **noncore** matters.

The Removing Parties hereby consent to entry of final orders or judgment by the Bankruptcy Judge.

STATUS OF REMOVED ACTION:

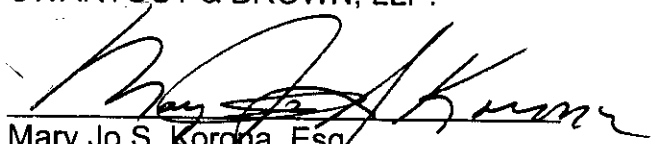
Counsel for the Removing Parties requested an extension of time to answer or otherwise plead in response to the complaint until April 3, 1998 in exchange for an agreement to receive service of the summons and complaint for two of the four Removing Parties. Counsel for the plaintiff in the Removed Action so agreed; however a Stipulated Order has not yet been submitted to any court.

SUPPORTING DOCUMENTS:

Copy of the Notice of Removal with attachments filed with the United States Bankruptcy Court for Western District of New York and a copy of the receipt evidencing payment of the filing fee of $150.00 made to the Clerk of the Bankruptcy Court.

Dated: February 26, 1998

LAWRENCE, WERNER, KESSELRING, SWARTOUT & BROWN, LLP.



Mary Jo S. Koroma, Esq.
Counsel to the Removing Parties in the proceeding before the United States Bankruptcy Court for the Western District Of New York
700 First Federal Plaza
Rochester, New York 14614
(716) 325-6446

UNITED STATES
BANKRUPTCY COURT
Western District of New York
Rochester Division

00082193 - PF
February 26, 1998

Code	Case #	Qty	Amount
ADV.PRO	98-20223	1 @	150.00
			150.00 CH

Debtor: [illegible] INTERNATIONAL INC.

TOTAL => 150.00

[illegible]
[illegible]
[illegible]
Rochester, NY 14614

B 104 (11/86)

ADVERSARY PROCEEDING COVER SHEET

(Instructions on Reverse)

ADVERSARY PROCEEDING NUMBER (Court Use Only)

PLAINTIFFS	DEFENDANTS
THRIFTY RENT-A-CAR SYSTEM, INC.	SERVICE LINKS INTERNATIONAL, INC., SUKHAKAR R. VADDI, NAGENDRA PRASAD KAZA and SATYA N. NALLAMOTHU

ATTORNEYS (Firm Name, Address, and Telephone No.)	ATTORNEYS (If Known)
Hall, Estill, Hardwick, Gable, Golden & Nelson, PC., Attn: Steven W. Soule 320 South Boston, Suite 400, Tulsa, OK 74103 (918)594-0466 ☐ NO ATTORNEY	Lawrence, Werner, Kesselring, Swartout & Brown, LLP Attn: Mary Jo S. Korona, Esq. 700 First Federal Plaza, Rochester, NY 14614 (716) 326-6446

PARTY (Check one box only) ☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☒ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Non core proceeding commenced by Thrifty Rent-A-Car System, Inc. to collect money pursuant to alleged guarantees of debt owed by Service Links International of NY, Inc. Relevant statutes 28 USC 157(c), 28 USC 1452, FRBP 9027

NATURE OF SUIT

(Check the one most appropriate box only.)

- ☐ 454 To Recover Money or Property
- ☐ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property
- ☐ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property
- ☐ 424 To object to or revoke a discharge 11 U.S.C. § 727
- ☐ 455 To revoke an order of confirmation of a Chap. 11 or Chap. 13 Plan
- ☐ 426 To determine the dischargeability of a debt 11 U.S.C. § 523
- ☐ 434 To obtain an injunction or other equitable relief
- ☐ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan
- ☐ 456 To obtain a declaratory judgment relating to any of foregoing causes of action
- ☒ 457 To determine a claim or cause of action removed to a bankruptcy court
- ☐ Other (specify)

ORIGIN OF PROCEEDINGS (Check one box only.) ☐ 1 ORIGINAL PROCEEDING ☒ 2 REMOVED PROCEEDING

CHECK IF THIS IS A CLASS ☐ ACTION UNDER F.R.C.P. 23

DEMAND	NEAREST THOUSAND	OTHER RELIEF SOUGHT	☐ JURY DEMAND
	$ 100,000		

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES

NAME OF DEBTOR	BANKRUPTCY CASE NO.
Service Links International of New York, Inc.	98-20223

DISTRICT IN WHICH CASE IS PENDING	DIVISIONAL OFFICE	NAME OF JUDGE
Western	Rochester	John C. Ninfo, II

RELATED ADVERSARY PROCEEDING (IF ANY)

PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.

DISTRICT	DIVISIONAL OFFICE	NAME OF JUDGE

FILING FEE (Check one box only.) ☐ FEE ATTACHED ☐ FEE NOT REQUIRED ☐ FEE IS DEFERRED

DATE	PRINT NAME OF ATTORNEY	SIGNATURE OF ATTORNEY
2/26/98	Mary Jo S. Korona	Mary Jo S. Korona

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK AT ROCHESTER

THRIFTY RENT – A – CAR SYSTEM, INC.

Plaintiff,

Original CV Action Number: 98CV0075 C(E)

-vs-

BK AP No.: 98-2034

SERVICE LINKS INTERNATIONAL, INC., SUKHAKAR R. VADDI, NAGENDRA PRASAD KAZA and SATYA N. NALLAMOTHU,

Defendants.

NOTICE OF REMOVAL OF ALL CAUSES OF ACTION ASSERTED AGAINST ALL OF THE NAMED DEFENDANTS TO THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK

REMOVED CLAIMS AND/OR CAUSES OF ACTION:

All claims asserted against the defendants named in Thrifty Rent –A- Car System, Inc. vs. Service Links International, Inc. et al. 98 CV 0075C(E) ("Removed Action"), an action commenced in the United States District Court for the Northern District of Oklahoma at Tulsa on January 28, 1998.

PARTIES FILING NOTICE OF REMOVAL:

Sudhakar R. Vaddi, Nagendra Prasad Kaza, Satya N. Nallamothu and Service Links International, Inc. ("Removing Parties").

CLAIMS OR CAUSES OF ACTION REMOVED TO UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NEW YORK:

All causes of action asserted against the Removing Parties.

FACTS UPON WHICH REMOVAL IS BASED:

The Removing Parties are defendants in an action commenced by Thrifty Rent –A- Car System, Inc. to recover monies claimed due by virtue of alleged guarantees from the Removing Parties in favor of Thrifty Rent-A-Car, System, Inc. The primary obligor is Service Links International of New York, Inc. ("DIP") which is a debtor in possession in a chapter 11 proceeding commenced in the United States Bankruptcy Court for the Western District of New York under the caption of In Re Service Links International of New York, Inc. , Bankruptcy Case No.: 98-20223 on January 23, 1998.

The Removing Parties are listed as co-debtors in relationship to the debt owed by the DIP to Thrifty Rent-A-Car System, Inc. The Removed Action is related to the pending Chapter 11 proceeding in that the outcome of the Removed Action will alter the DIP's rights, liabilities, options or freedom of action, will effect the reorganization effort and impact the administration of the bankruptcy estate.

Upon removal the removed matters are **noncore** matters.

The Removing Parties hereby consent to entry of final orders or judgment by the Bankruptcy Judge.

STATUS OF REMOVED ACTION:

Counsel for the Removing Parties requested an extension of time to answer or otherwise plead in response to the complaint until April 3, 1998 in exchange for an agreement to receive service of the summons and complaint for two of the four Removing Parties. Counsel for the plaintiff in the Removed Action so agreed on February 25, 1998; however a Stipulated Order has not yet been submitted to the court.

SUPPORTING DOCUMENTS:

The within Notice, Copies of the Summons and Complaint filed in the Oklahoma action, Adversary Proceeding Cover Sheet, Filing Fee of $150.00.

Dated: February 26, 1998

LAWRENCE, WERNER, KESSELRING, SWARTOUT & BROWN, LLP.

Mary Jo S. Korona, Esq.
Counsel to the Removing Parties in the proceeding before the United States Bankruptcy Court for the Western District Of New York
700 First Federal Plaza
Rochester, New York 14614
(716) 325-6446

United States District Court

NORTHERN DISTRICT OF OKLAHOMA

SUMMONS IN A CIVIL ACTION

Thrifty Rent-A-Car System, Inc.

V.

CASE NUMBER: 98 CV 0075C(E)

Service Links International, Inc.,
Sudhakar R. Vaddi, Nagendra Prasad Kaza and
Satya N. Nallamothu

TO: (Name and Address of Defendant)

Service Links International, Inc.
c/o The Company Corporation
Three Christina Centre
201 N. Walnut Street
Wilmington, DE 19801

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)
Steven W. Soule
Hall, Estill, Hardwick, Gable, Golden & Nelson
320 South Boston Avenue, Suite 400
Tulsa, OK 74103

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Phil Lombardi, Clerk

CLERK

JAN 30 1998

DATE

BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	Case No.
SERVICE LINKS INTERNATIONAL, INC., a New York corporation, SUDHAKAR R. VADDI, an individual, NAGENDRA PRASAD KAZA, an individual, and SATYA N. NALLAMOTHU, an individual,	)	
Defendants.	)	

FILED
JAN 28 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

98CV0075C(E)

COMPLAINT

Plaintiff Thrifty Rent-A-Car System, Inc. ("Thrifty"), for its claims against the Defendants, Service Links International, Inc. ("Corporate Defendant"), Sudhakar R. Vaddi, an individual, Nagendra Prasad Kaza, an individual, and Satya N. Nallamothu, an individual (collectively, the "Individual Defendants") (the Corporate Defendant and the Individual Defendants may be referred to herein as the "Defendants"), alleges and states as follows:

JURISDICTION AND VENUE

1. Thrifty is, and was at all times hereinafter mentioned, a corporation incorporated under the laws of the State of Oklahoma and having its principal place of business in the City of Tulsa, Tulsa County, Oklahoma.

2. Upon information and belief, Defendant Service Links International, Inc. is a New York corporation with its principal place of business in the State of New York. Defendant Sudhakar R. Vaddi is a citizen and resident of the State of Missouri. Defendant Nagendra Prasad Kaza is a

citizen and resident of the State of Missouri. Upon information and belief, Defendant Satya N. Nallamothu is a citizen and resident of the State of Michigan.

3. The Corporate Defendant is the sole shareholder of Service Links International New York, Inc. d.b.a. Thrifty Rent-A-Car, a New York corporation ("Service Links"). The Individual Defendants are principal officers of Service Links and the 100% owners of the Corporate Defendant. On January 23, 1998, Service Links filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of New York, Case Number 98-20223.

4. The Defendants have had significant contacts with the State of Oklahoma and have consented to jurisdiction and venue in connection with the agreements described below.

5. Jurisdiction of this case is proper with this Court pursuant to 28 U.S.C. § 1332, as this case is a civil action in which the matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy Five Thousand Dollars ($75,000.00), and is between citizens of different states. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 and pursuant to the forum selection clauses in the below described agreements.

FACTUAL ALLEGATIONS

6. Thrifty is in the business of franchising persons to operate vehicle rental franchises. Thrifty owns and has extensively used in business, among others, the mark "Thrifty," which is registered on the principal register of the United States Patent and Trademark Office under the registration number 816,350. The registration is valid and subsisting, and registration number 816,350 is now incontestable in accordance with 15 U.S.C. §§ 1065 and 1115(b).

7. Since 1962, Thrifty has used the Thrifty Marks to identify its vehicle rental locations and to distinguish them from those operated by others. Thrifty has prominently displayed the Thrifty Marks on all things associated with Thrifty's services and business, including, among other things, signs located at all Thrifty rental locations, rental agreements, stationary, promotional materials, advertising, telephone directory advertising, and in periodicals distributed throughout the United States.

8. On January 1, 1995, an agreement entitled "License Agreement for Vehicle Rental, Leasing & Parking" (the "License Agreement") was entered into between Service Links and Thrifty. The License Agreement granted Service Links the right to operate a Thrifty Car Rental business in several counties in the State of New York as more specifically defined in the License Agreement. A copy of the License Agreement is attached hereto as Exhibit "A."

9. On January 1, 1995, an agreement entitled "Master Lease Agreement" (the "Master Lease Agreement") was entered into by Service Links and Thrifty, for the purpose of leasing vehicles to Service Links to be used in the operation of Service Links's Thrifty Car Rental franchise. A copy of the Master Lease Agreement is attached hereto as Exhibit "B."

10. On or about January 1, 1995, Service Links executed and delivered a Promissory Note and Security Agreement ("Note") to Thrifty in the amount of $37,796.59. A copy of the Note is attached hereto as Exhibit "C."

11. In connection with the execution of the Note, the Individual Defendants executed a Guaranty Agreement, pursuant to which they unconditionally guaranteed the prompt and full payment and performance when due of all Indebtedness of Service Links to Thrifty. A copy of the Guaranty is attached hereto as Exhibit "D."

12. On February 1, 1995, the parties entered into an Agreement which made February 1, 1995, the effective date of the License Agreement, the Master Lease Agreement, the Note and the Guaranty Agreement. A copy of the Agreement is attached hereto as Exhibit "E."

13. Pursuant to paragraph 3.20 of the License Agreement, Service Links agreed to pay to Thrifty, as and when due, all obligations incurred by Service Links to Thrifty in the operation of the Thrifty Car Rental business, whether incurred under the License Agreement or any other agreements with Thrifty.

14. The obligations of Service Links under the License Agreement were personally guaranteed by the Defendants. See Addendum One to Exhibit "A."

15. In connection with the execution of the Master Lease Agreement, the Defendants executed personal guarantees, pursuant to which they unconditionally guaranteed the performance of all obligations and the payment of all sums or damages which are due and payable to Thrifty. The personal guarantees are attached to Exhibit "B."

16. Service Links and the Defendants are in default of their obligations under the License Agreement, the Master Lease Agreement and the Note described above.

17. Thrifty issued a notice of termination of the License Agreement and the Master Lease Agreement by letter to Service Links and the Defendants, dated December 11, 1997, and delivered by facsimile, by certified mail and UPS overnight mail on December 11, 1997.

COUNT I

(Breach Of The License Agreement)

18. Thrifty realleges and incorporates by reference the allegations of Paragraphs 1 through 17 above.

19. Defendants remain obligated to pay certain amounts due and owing to Thrifty under the terms of the License Agreement but have failed to do so. As a result of their failure to pay those amounts due and owing to Thrifty under the License Agreement pursuant to their personal guaranties, the Defendants are indebted to Thrifty, for which indebtedness Thrifty is entitled to judgment. The total amount owed by Defendants to Thrifty is in excess of $75,000.00.

20. Thrifty is entitled to an award of attorneys fees and costs incurred herein.

COUNT II

(Breach of The Master Lease Agreement)

21. Thrifty realleges and incorporates by reference the allegations of Paragraphs 1 through 20 above.

22. Service Links failed to pay certain amounts now due or past due under the Master Lease Agreement. As a result of the breaches of the Master Lease Agreement, Defendants remain obligated to pay certain amounts due and owing and for all amounts which may become due and owing to Thrifty pursuant to their personal guaranties under the Master Lease Agreement. Defendants have failed to pay the amounts owing.

23. As a result of their failure to pay those amounts due and owing to Thrifty, Defendants are indebted to Thrifty for such amounts due and for all additional amounts which may become due thereunder, for which indebtedness Thrifty is entitled to judgment.

24. Pursuant to the terms of the Master Lease Agreement, Thrifty is entitled to an award of its attorneys' fees incurred herein.

COUNT III

(Breach of the Promissory Note and Security Agreement)

25. Thrifty realleges and incorporates by reference the allegations of Paragraphs 1 through 24 above.

26. There is due and payable to Thrifty under the Note the approximate amount of $22,966.00, plus interest at the rate of 13.5% per annum until paid, plus attorney's fees and costs. As a result of the breaches of the Note, the Individual Defendants are indebted to Thrifty pursuant to the Guaranty Agreement for all amounts due and for all additional amounts which may become due thereunder. Despite demand for payment, the Individual Defendants refused and continue to refuse to pay the amounts due. Thrifty is entitled to a judgment for those amounts.

27. Pursuant to the terms of the Note and the Guaranty Agreement, Thrifty is entitled to an award of its attorney's fees and costs incurred herein.

PRAYER FOR RELIEF

WHEREFORE, Thrifty respectfully requests that this Court:

1. Grant a judgment on Counts I and II in its favor and against the Defendants Service Links International, Inc., a New York corporation, Sudhakar R. Vaddi, an individual, Nagendra Prasad Kaza, an individual, and Satya N. Nallamothu, an individual, jointly and severally, in an amount in excess of $75,000.00, plus prejudgment interest and postjudgment interest thereon at the maximum lawful rate, for the amounts owed for breach of the License Agreement and the Master Lease Agreement;

2. Grant a judgment on Count III in its favor and against the Defendants Sudhakar R. Vaddi, an individual, Nagendra Prasad Kaza, an individual, and Satya N. Nallamothu, an individual, jointly and severally, in an amount in excess of $22,966.00, plus interest thereon at the rate of 13.5% per annum, until paid; and

3. Award Thrifty its costs of this action, including a reasonable attorney's fee, and such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

Steven W. Soulé, OBA #13781
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0466
(918) 594-0505 (Facsimile)

ATTORNEYS FOR THRIFTY RENT-A-CAR SYSTEM, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 3-2-98

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No. 97CV968 H
PATRICIA LEE,	)	
Defendant.	)	

FILED

FEB 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 27TH day of FEBRUARY, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Patricia Lee, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Patricia Lee, acknowledged receipt of the Complaint on November 24, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Patricia Lee, for the principal amount of $2,416.68, plus accrued interest of $115.88, plus interest thereafter at the rate of 5 percent per annum until judgment, plus filing fees in the amount of $150.00 as

provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/jmo

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-2-98

UNITED STATES OF AMERICA,

Plaintiff,

v.

TERRY L. STRICKLIN,

Defendant.

Civil Action No. 97CV409H

FILED

FEB 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 27th day of February, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Terry L. Stricklin, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Terry L. Stricklin, was served with Summons and Complaint on August 25, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Terry L. Stricklin, for the principal amount of $2,981.17, plus accrued interest of $652.07, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918)581-7463

LFR/llf

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 27 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC.,

Plaintiff,

vs.

BEST LEASING, INC., and ALDO MUROS, an individual,

Defendants.

Case No. 96-C-1136-BU

ENTERED ON DOCKET
DATE MAR 02 1998

ADMINISTRATIVE CLOSING ORDER

As counsel for Defendant, Best Leasing, Inc., has represented that a Chapter 11 petition has been filed in New Jersey for Defendant, Best Leasing, Inc., the Court finds that this matter should be administratively closed during the pendency of the bankruptcy proceedings before the United States Bankruptcy Court for the District of New Jersey. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the bankruptcy proceedings.

The parties are **DIRECTED** to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may reopen this matter, if necessary, to obtain a final determination of the claims against Defendant, Best Leasing, Inc.

Entered this 27th day of February, 1998.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

239

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALICE R. WALLACE, on behalf of JILLIAN WALLACE, SS# 447-17-7061

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-664-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 27th day of February 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 1, 1997, President William J. Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALICE R. WALLACE, on behalf of JILLIAN WALLACE, SS# 447-17-7061

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-664-J

ORDER[2/]

Plaintiff, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because Plaintiff meets Listing 112.11 for Attention Deficit Hyperactivity Disorder. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision for further proceedings consistent with the Order of the Court.

[1/] Effective March 1, 1997, President William J. Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on March 13, 1995. [R. at 26-33]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on May 24, 1996. [R. at 5].

18

I. PLAINTIFF'S BACKGROUND

Jillian Wallace was born March 9, 1989. [R. at 42]. Mrs. Wallace, Jillian's mother testified that Jillian had attention deficit disorder, oppositional defiant disorder, and asthma. [R. at 46-47]. Jillian's mother stated that her daughter was currently on Ritalin, but that she was difficult to control.

Jillian testified at a second hearing on August 26, 1994. Jillian stated that she liked to watch "the Turtles . . . and Big Bird and stuff." [R. at 58]. Jillian testified that she could sit and watch an entire show. [R. at 58]. Jillian is enrolled in a special needs pre-school. [R. at 61-62].

An IFA Format and Case Summary for Jillian was completed March 15, 1993. It indicated that Jillian's impairments in cognitive development, communicative development, motor development, and personal/behavioral development were "less than moderate." [R. at 80-83]. Jillian's social development was noted as "no evidence of limitation." [R. at 81]. A second IFA was completed and similar findings were recorded on June 23, 1993. [R. at 93-96].

Jillian was reviewed on several occasions by the Children's Medical Center. On January 26, 1993, the records note that Jillian was happy and appeared of normal intelligence. Jillian's speech was reported as difficult to understand. [R. at 145-152]. On December 8, 1992, Jillian was reported as happy, healthy, verbal, impulsive and having a short attention span. Jillian's chronological age at the time was three years nine months. On the tests on which Jillian was evaluated, Jillian's "scores" ranged from three years to four years. [R. at 152-155].

Jillian was examined by a social security examiner on February 24, 1993. [R. at 158]. The examiner reported that Jillian had difficulty sitting still, had a poor attention stand, was easily distracted, was difficult to understand, and expressed herself in three to four word sentences. The examiner noted that Jillian probably had attention deficit disorder and would benefit from some type of schooling. The examiner concluded that Jillian probably appeared younger than her actual age by a few months. [R. at 158].

The Broken Arrow Public Schools competed an Individualized Education Program assessment on Jillian on October 20, 1993. Jillian's cognitive, perceptual, verbal and motor skills were all reported as being within normal limits. [R. at 163]. Jillian was noted as having difficulty paying attention to tasks and as exhibiting oppositional behavior. [R. at 158].

An Individualized Education Program Review completed on October 18, 1994 when Jillian was five years old indicated that Jillian's cognitive, perceptual, verbal, motor and social skills were within normal limits. [R. at 337]. Jillian was noted as having difficulty with her self-help skills and as exhibiting oppositional behavior towards her parent. [R. at 337]. Jillian's "age score" ranged was noted as 5.7 (overall), 5.4 (cognitive), 5.4 (language), 5.5 (fine motor), 5.5 (gross motor), 5.3 (social emotional), 4.3 (self-help), 5.7 (readiness), and 5.9 (math). [R. at 337].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The statutes and regulations in effect at the time of the ALJ's decision required application of a four-step evaluation process.[4/] See 42 U.S.C. § 1382c(a)(3)(A)(1994); 20 C.F.R. § 416.924(b)(1994).

After the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act. Pub. L. No. 104-193, 110 Stat. 2105. This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

> An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 1382c(a)(3)(C)(i). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending. Consequently, this new standard applies to the Plaintiff's case. See also Gertrude

---

[4/] Evaluation of the disability of a child followed a four-step process. First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If he is, the minor was considered not disabled. If the minor was not engaged in substantial gainful activity, the Commissioner then determined whether the minor's impairment was severe. If the impairment was not severe, the minor was considered not disabled. If the minor's impairment was severe, the Commissioner then determined whether the minor had an impairment that met or equaled the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listings"). If the minor's impairment was of Listing severity, the minor was considered presumptively disabled. If the minor's impairment was not of Listing severity, the Commissioner was required to determine whether the impairment was of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133 (10th Cir. 1997) (applying new standards to a children's disability appeal).

The regulations which implement the Act provide:

> (d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.*
> An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.
>
> > (1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.
> > (2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, Plaintiff is disabled only if Plaintiff can establish that she meets a Listing.[5/] See also Brown, 120 F.3d 1133 at 1135 ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.").

[5/] At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

III. THE ALJ'S DECISION

The ALJ denied benefits at Step Four. The ALJ mentioned Step Three, noting that "[b]ased upon a full and careful review of the testimony and evidence, the undersigned finds that the claimant does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4." [R. at 27-28].

IV. REVIEW

When the ALJ held a hearing on this case and subsequently wrote his opinion, the applicable law was different than the law that currently applies. The problem created in this case is a result of the intervening change in the law. Due to the new statutes, children are considered disabled only if they meet or equal a "Listing." However, because the applicable law at the time of his decision was different, the ALJ did not discuss the Listings, in any detail, in his Order.

At step three of the sequential evaluation process, a claimant's impairment is compared to the Listings (20 C.F.R. Pt. 404, Subpt. P, App. 1). If the impairment is equal or medically equivalent to an impairment in the Listings, the claimant is presumed disabled. A plaintiff has the burden of proving that a Listing has been equaled or met. Yuckert, 482 U.S. at 140-42; Williams, 844 F.2d at 750-51. Furthermore, in his decision, the ALJ is "required to discuss the evidence and explain why he found that [the claimant] was not disabled at step three." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996).

As noted above, in this case, the ALJ merely stated that based on a review of the evidence, the claimant did not meet a Listing. This type of procedure is exactly what the Court of Appeals for the Tenth Circuit was critical of in Clifton. In Clifton the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at step three, or even identify the relevant Listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. As in Clifton, the ALJ in this case did not discuss the medical evidence in connection with his step three conclusion, and did not identify any potentially applicable Listings. In Clifton, the Tenth Circuit held that this type of a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

The Tenth Circuit held as follows:

> Under the Social Security Act,
>
> > [t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.
>
> 42 U.S.C. 405(b)(1). . . .
>
> > This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social

> Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .
>
> In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

The Court believes that the change in the applicable law during the time period between the decision of the ALJ and the decision of this Court is responsible for the situation presented in this case. However, because no specific findings were made by the ALJ at Step Three, this Court is unable to review the Step Three decision and determine whether or not it was supported by substantial evidence.

The Court wishes to make clear that it is in no way expressing an opinion as to whether Plaintiff actually meets or equals a Listing. In fact, a review of the evidence in the record could easily lead to the conclusion that Plaintiff does not meet the Listings and is therefore not disabled. However, this Court lacks the authority to make such findings. Rather, this Court is limited to reviewing the findings made by the ALJ

and the Commissioner and determining if those findings are supported by substantial evidence. Consequently, the Court is simply remanding this case so that the ALJ can adequately discuss his conclusions in connection with any applicable Listings. Only then can this Court review the ALJ's decision in connection with the Listing(s).

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this Order.

Dated this 27 day of February 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN F. ROURKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.96 CV-00629-M**
	)	
JACK GRAHAM,	)	
d/b/a AUTO SHOWCASE ONE;	)	
and OLD REPUBLIC SURETY	)	
COMPANY, as	)	ENTERED ON DOCKET
Issuer of Bond No. LSC1016625	)	DATE 3-2-98
	)	
Defendants.	)	

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, JOHN F. ROURKE, and dismisses his action against Defendant OLD REPUBLIC SURETY COMPANY, as Issuer of Bond No. LSC1016625 with prejudice.

Respectfully submitted;

By: Sharon Womack Doty

SHARON WOMACK DOTY OBA # 14462
P. O. Box 21177
Tulsa, Oklahoma 74101
(918) 592-1383
(918) 592-1339 (Facsimile)

&

ALINDA F. STEPHENSON OBA # 15847
400 Beacon Building
406 South Boulder Avenue
Tulsa, Oklahoma 74103-3825
(918) 584-0040

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I, the undersigned attorney, hereby certify that on the 27th day of February, 1998 a true and correct copy of the foregoing document was mailed via U.S. Mail, postage prepaid to the following:

James C. Garland, III
1732 Southwest Blvd.
Tulsa, OK 74107

George Hooper
2745 E. Skelly Drive, Suite 102
Tulsa, OK 74105

Sharon Womack Doty

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK L. NEAL,
SSN: 442-44-2003,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 96-CV-1135-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 26th day of Feb., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACK L. NEAL,
SSN: 442-44-2003,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,[1]

DEFENDANT.

NO. 96-CV-1135-M

ORDER

Plaintiff, Jack L. Neal, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine

---

[1] Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

[2] Plaintiff's application for disability benefits, filed on April 25, 1994, was denied initially and upon reconsideration. A hearing was conducted August 17, 1995, after which the ALJ entered the decision dated September 8, 1995, which is the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 8, 1996. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born July 31, 1945 and was 50 years old at the time of the hearing on August 17, 1995. He has a 10th grade education and past relevant work as a mechanic. He claims inability to work since August 19, 1992, as the result of pain associated with multiple traumatic injuries to his back, neck and feet. The ALJ determined that Plaintiff is impaired by severe lumbosacral strain and found that, although Plaintiff was unable to perform his past relevant work, he was capable of performing a full range of light work. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Plaintiff argues that the ALJ failed to properly consider the limiting effects of his pain in combination with his other impairments and that he shifted the burden of proof at step five from the Commissioner to the claimant. Plaintiff also contends the ALJ based his credibility determination upon a misrepresentation of the record and ignored his work history. Plaintiff further asserts the ALJ did not accord the treating physicians' opinions proper weight and that he substituted his own opinion for medical evidence. For the reasons expressed below, the Court holds that the existing record and findings will not support the denial of benefits on the ALJ's stated rationale and, therefore, the case must be reversed and remanded.[3]

Medical Records

Plaintiff worked steadily throughout his adult life as a mechanic. [R. 73-80,87]. In October 1985, Plaintiff's back and neck were injured when a truck, under which he was working, fell. [R. 100-101]. He was hospitalized, then underwent physical therapy for approximately two months. [R. 99]. He continued treatment by Richard Stamile, M.D., an orthopedic surgeon, through April 1986, for persistent neck and back pain with medication and local injections of Dexamethasone and Xylocaine. [R.

[3] The Court notes that Plaintiff attached to his brief, a document he titled: "Exhibit A, Medical Summary" and that he referred to the summary in the text of his brief. Defendant, Commissioner, included in his brief an objection to the attachment and requested the Court strike it as improper. The Court finds the submission of the summary to be in violation of its January 14, 1997 Scheduling Order wherein the parties were ordered to submit briefs "not to exceed 5 pages exclusive of signature block and certificate of service." Plaintiff's attorney is admonished to apply to the Court for permission to file a brief in excess of five pages should he feel the need to do so. Future violations of the Scheduling Order may result in the striking of Plaintiff's brief in its entirety.

161-168]. In May 1986, he was fitted with a T.E.N.S. unit and released to return to work. [R. 159-160]. On June 18, 1986, Dr. Stamile reported that Plaintiff was employed as a "parts manager at U-Haul" but that he was complaining of occasional numbness in parts of his hands. [R. 158]. Dr. Stamile recommended continued use of the T.E.N.S. unit, occasional physical therapy for the following 6 months and evaluated 10% permanent partial impairment to the body as a whole. *Id.* Plaintiff returned once more to Dr. Stamile in July 1987 for consistent and worsening pain in his neck, shoulders and lower back. [R. 157]. He was given another injection, anti-inflammatory medication and sent for an x-ray. *Id.* On September 14, 1987, Dr. Stamile noted that the injection had afforded Plaintiff "a great deal of relief", that the x-ray revealed no increase in osteoarthritic changes not present in prior films and advised Plaintiff to return for consideration of nerve conduction studies, if the numbness recurs. [R. 156].

On August 19, 1992, Plaintiff was seen by Tracy L. Pyles, M.D. for injury sustained to his lower back while lifting a 55 gallon barrel at work a few days before. [R. 144]. An x-ray of Plaintiff's spine was unremarkable. Dr. Pyles prescribed Flexeril and Lortab and physical therapy, then referred him to Christopher G. Covington, M.D., a neurosurgeon, for evaluation. *Id.*

Dr. Covington examined Plaintiff on September 14, 1992 and suspected either an L3-4 or L4-5 disk protrusion. [R. 138-139] He arranged for a myelogram CT scan which revealed what he thought were two small ruptures. [R. 132-133, 137]. An MRI was read as negative. [R. 135]. Dr. Covington noted on October 9, 1992 that

"the little bulge" he had seen on the CT scan might have been a large epidural vein. He decided to pursue conservative treatment. [R. 135]. In a December 7, 1992 note, Dr. Covington commented upon Plaintiff's very atalgic lumbering gait, virtually no extension or flexion, giveaway weakness of the left foot secondary to pain, positive straight leg raising and diminished left ankle jerk. [R. 134]. He stated that, although the MRI had failed to show it, he still suspected a 5-1 or 4-5 disk on the left side and referred Plaintiff to Mark Hayes for consult. *Id.*

Dr. Hayes examined Plaintiff on December 21, 1992. [R. 178]. He found that Plaintiff's inability to toe walk very well was secondary to a problem with a neuromatous foot rather than a back problem.[4] He noted give-away weakness of the extensor hallucis longus muscle, tibialis anterior and the peroneal muscles on the left, less so on the right and tenderness at the L4 level. Torsion test to the left and right were painful. X-rays "looked like he had a ruptured disk off toward the right side at L5-S1 but clinical evidence did not strongly correlate with this." The MRI also showed evidence of internal disk disruption at L3-4. Dr. Hayes recommended further evaluation, including an awake lumbar diskogram, which was done December 22, 1992 and which he reported as "negative." [R. 181]. The Court notes the record contains conflicting reports which indicate the radiologist's impression on these two studies was "abnormal." R. 188-189].

---

[4] Neuroma is defined as a tumor growing from a nerve or made up largely of nerve cells and nerve fibers. *Dorland's Illustrated Medical Dictionary*, 28th Ed. p. 1130.

On January 13, 1993, Plaintiff returned to Dr. Pyles, who noted that the neurosurgeons had determined the problem was not "significant enough to do surgery." [R. 143]. He recommended therapy, a T.E.N.S. unit and Feldene for Plaintiff's continuing complaints of pain and weakness. *Id.* Plaintiff continued to see Dr. Pyles through April 1993 when it was reported that he was "really not making much headway with this and would probably be best to evaluate for a rating or at a work potential." [R. 142].

On June 25, 1993, Laurence Altshuler, M.D. performed a disability determination evaluation of Plaintiff's condition for workers' compensation purposes. [R. 146-147]. He reported that Plaintiff complained of pain in his neck, upper back, shoulder, lower back and feet, that he had headaches and numbness and tingling in the upper extremities. He determined that Plaintiff's latest injury, combined with his prior injuries, resulted in a material increase in the percentage of disability assessed by workers' compensation standards. He opined that, due to Plaintiff's injuries, his level of education, and his having always done manual labor with no training and skills, he was "no longer employable and therefore is permanently totally disabled." *Id.*

References to a 1990 injury sustained by Plaintiff to his feet are found in the record in history taken by various physicians, [R. 146, 148, 151], and an examination note by Dr. Hayes that a neuromatous foot was found. [R. 178].

A lengthy report, unsigned, is found in the record on Outbound Medical Network stationary addressed to a workers' compensation court judge dated

November 12, 1993. [R. 148-151]. The content of the report is primarily repetition of Plaintiff's present complaints and past medical, social and education history. A physical examination was conducted and range of motion testing done. X-rays were taken which were "negative both feet. There is a small spur off the posterior left OS calcis. Minor degenerative changes of the lumbar spine with spurs at the margins of the lower segments and spina bifida occulta involving L5 S1 S2." An impairment rating for workers' compensation purposes was given. No discussion of Plaintiff's ability or inability to work was included in the report. *Id.*

On June 2, 1994, Plaintiff presented to the Veterans Administration (VA) Outpatient Clinic with complaints of back pain and an injury to the right knee and ankle. [R. 153]. He reported current medications as Modiuretic, OTC (over-the-counter) pain medication 12-15/day, "taking ES (extra-strength) tylenol 12-15/day for pain." *Id.* The record also contains a letter dated April 15, 1994 from the Department of Veterans Affairs addressed to Plaintiff which denied vocational training, stating: "[w]e have determined that based upon your disabilities it is not reasonably feasible for you to benefit from this training program enough to become employed." [R. 154]. A September 16, 1994 certification of nonservice-connected disability awarded October 1, 1993, from the VA is included in the record. [R. 214].

Discussion

The Commissioner bears the burden of proof at step five to establish that, in light of Plaintiff's residual functional capacity (RFC), age, education and work

experience, he could still perform other jobs existing in significant numbers in the national economy. *Ragland v. Shalala*, 992 F.2d 1056, 1057 (10th Cir. 1993).

In this case, the ALJ found that Plaintiff "has the residual functional capacity to perform the full range of light work", citing 20 C.F.R. 404.1567. [R. 22]. Social Security regulations define light work as:

> involv[ing] lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

Id. Since the ALJ found that Plaintiff has the residual functional capacity to perform a full range of light work and would qualify for most of the jobs falling within that RFC category, the record must contain substantial evidence to support that finding. Absent such evidence, the Secretary cannot satisfy the burden at step five without producing expert vocational testimony or other similar evidence to establish the existence of significant work within the claimant's capabilities. *Hargis v. Sullivan*, 945 F.2d 1482, 1491 (10th Cir.1991).

The ALJ noted in his decision that Plaintiff had sustained injury to his feet in 1990 that required surgery. [R. 18]. However, in determining Plaintiff's RFC, he did not mention that Plaintiff's disability report claimed inability to stand and listed "feet" as one of the conditions that prevents work, [R. 83], or the notation by the interviewer that Plaintiff "walked with very noticeable limp." [R. 90]. He stated that

Plaintiff testified he cannot work because of back pain and headaches, [R. 18], but did not address Plaintiff's testimony regarding his inability to stand or walk due to pain in his feet. [R. 41, 45]. Nor did he mention the report by Dr. Hayes that a neuromatous foot affected Plaintiff's gait, [R. 178], or that a knot, suspicious for a neuroma, was found by a physician in 1993, [R. 151]. The ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. § 404.1527(d), and to "consider all relevant medical evidence of record in reaching a conclusion as to disability," *Baker v. Bowen*, 886 F.2d 289, 291 (10th Cir. 1989). Because objective medical evidence showed that Plaintiff had a foot problem producing pain, the ALJ was required to consider his assertions of pain upon walking and standing and to decide whether he believed them. *Thompson*, 987 F.2d at 1489; *Luna*, 834 F.2d at 163. The ALJ's disregard of this evidence affected his evaluation of Plaintiff's credibility regarding his subjective complaints of pain. See *Winfrey*, 92 F.3d at 1021. This will require reevaluation upon remand.

An ALJ's finding regarding the noncredibility of a claimant does not compel a finding of not disabled. Rather, the credibility determination is just a step on the way to the ultimate decision. The ALJ must also determine the claimant's RFC level, whether he can perform the full range of work at his RFC level on a daily basis and whether he can perform most of the jobs at his RFC level. *Thompson*, 987 F.2d at 1491, (citing *Frey*, 816 F.2d at 512-13).

In making his finding that Plaintiff could do the full range of light work, the ALJ relied on the absence of contraindication in the medical records. The ALJ stated that

none of Plaintiff's treating physicians had placed any limitations on his ability to stand, walk or sit. [R. 20]. However, they also did not say that Plaintiff could stand, walk or sit at the light level of work. The Tenth Circuit has been quite clear in ruling that "[t]he absence of evidence is not evidence." *Thompson*, 987 F.2d at 1491. The Commissioner's burden of proof is not met by saying that information is absent. *Huston v. Bowen* 838 F.2d 1125, 1132 (10th Cir. 1988). The ALJ pointed to nothing in the record to contradict Plaintiff's testimony that he is limited in his ability to stand and walk due to back and/or feet pain. The ALJ's reliance on an alleged omission by Plaintiff's physicians effectively shifts the burden back to the claimant. The finding that Plaintiff can perform the walking and standing requirements for the full range of light work is not supported by substantial evidence.

The ALJ accorded "little weight" to the determination by the VA that Plaintiff is "unemployable" and eligible to receive nonservice-connected disability benefits. [R. 21]. He is correct that definitions of disability by other agencies are not binding on the Commissioner. They are entitled to some weight, however, and must be considered. *Baca v. Department of Health and Human Services*, 5 F.3d 476, 480 (10th Cir. 1993), *Fowler v. Califano*, 596 F.2d 600, 604 (3rd Cir. 1979). There is no indication in the record that the ALJ attempted to obtain the medical documentation, or discern if any existed, which the VA utilized in making its disability determination. The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. This duty exists even when claimant is represented by counsel. *Baca*, 5 F.3d at 479-80. In light of the scant medical evidence upon which

to form an assessment of Plaintiff's RFC, those records might have been helpful in understanding how his impairments affected his ability to do light work by Social Security standards. See 20 C.F.R. §§ 404.1513(a)(5), 404.1513(e) and 416.913(a)(5), 416.913(e). Alternatively, since the medical evidence was inconclusive, a consultative medical examination might have benefitted the ALJ's analysis.

The ALJ relied on the Medical-Vocational Guidelines (Grids), 20 C.F.R., Pt. 404, Subpt. P, App. 2, Table No. 2, Rule 202.18, to support the determination that Plaintiff is not disabled. It is well established that an ALJ may not rely conclusively on the grids unless he finds: (1) that the claimant has no significant nonexertional impairment; (2) that the claimant can do the full range of work at some RFC level on a daily basis; and, (3) that the claimant can perform most of the jobs in that RFC level. Furthermore, "[e]ach of these findings must be supported by substantial evidence." *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993). The "Grids" should not be applied conclusively in a particular case unless the claimant can perform the full range of work required of the pertinent RFC category on a daily basis and unless the claimant possesses the physical capacities to perform most of the jobs in that range. See *Ragland*, 992 F.2d at 1058; *Hargis*, 945 F.2d at 1490. Furthermore, reliance upon the "Grids" is particularly inappropriate when evaluating nonexertional limitations such as pain. *Hargis*, 945 F.2d at 1490. The Court finds that the Commissioner was not entitled to rely upon the Grids to establish the existence of jobs in the national economy which Plaintiff can perform because the

record does not support the ALJ's finding that Plaintiff has the capacity to perform the full range of light work.

The ALJ stated that his conclusion that Plaintiff can perform the full range of light work is borne out by Plaintiff's "reported activities, the medical evidence, and **the fact that the claimant takes no strong pain medication.**" [R. 20, emphasis added]. He based this finding upon the VA Outpatient Clinic notes that Plaintiff had reported he was taking "only over-the-counter Tylenol (Exhibit 21, page 2)." However, as Plaintiff has pointed out to the Court, that page of the medical record supports his contention that 12 to 15 Extra Strength Tylenol per day were insufficient for management of pain and that he had sought and received prescribed pain medication at the VA clinic.[5] At any rate, the ALJ, in rejecting Plaintiff's claim that he is disabled by pain because he was not taking more than "mild" pain medication, would necessarily have had to consider whether such treatment would benefit plaintiff or restore his ability to work. *Ragland*, 992 F.2d at 1060. All of the evidence on the issue supports Plaintiff's contention that his condition remained unimproved despite pain medication. The ALJ's misinterpretation of the medical evidence is legal error which must be corrected on remand.

The decision of the Commissioner is REVERSED and the case REMANDED for reassessment of Plaintiff's RFC under the appropriate legal standards. In remanding

---

[5] Robaxin, injection, an adjunct to rest, physical therapy and other measures for relief of discomfort associated with acute, painful musculoskeletal conditions, *Physician's Desk Reference*, 49th Ed. 1995, p. 2014, was administered by the VA physician.

this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler,* at 391.

Defendant's Motion To Strike the attachment to Plaintiff's Brief, titled: "Exhibit A, Medical Summary" is GRANTED.

SO ORDERED this 26th day of Feb, 1998.

Frank H. McCarthy

FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JANICE DEMARCO, Surviving Spouse of RICHARD DEMARCO, Deceased,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 94-C-863-BU

ENTERED ON DOCKET
DATE MAR 02 1998

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a resolution of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27th day of February, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

207

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JAX INTERNATIONAL, INC.,

Plaintiff,

vs.

DONALD S. APPEL, and MORGAN HENLEY EQUITY FUND, INC.,

Defendants.

Case No. 97-CV-703-BU

ORDER

On November 17, 1997, United States Magistrate Judge Sam A. Joyner issued a Report and Recommendation. In the Report and Recommendation, Magistrate Judge Joyner recommended that Defendants' motion to dismiss be granted. He also recommended that this action be dismissed without prejudice due to the Court's lack of personal jurisdiction over Defendants.

This matter now comes before the Court upon the timely objection of Plaintiff to the Report and Recommendation. In its objection, Plaintiff argues that Magistrate Judge Joyner's recommendation is fundamentally flawed because he failed to give proper weight to numerous telephone calls made into Oklahoma by Defendants as part of the alleged scheme to defraud Plaintiff. Plaintiff contends that these telephone calls constitute sufficient minimum contacts with Oklahoma for the Court to exercise personal jurisdiction over Defendants. In addition, Plaintiff contends that Magistrate Judge Joyner's reliance upon Far West Capital, Inc. v. Towne, 46 F.3d 1071 (10th Cir. 1995), was misplaced. According to

Plaintiff, the Tenth Circuit in Far West did not address the limits of personal jurisdiction based upon a defendant's fraudulent communications into a forum. Plaintiff maintains that this case is more properly governed by cases which recognize that the exercise of personal jurisdiction is proper where a non-resident defendant has made fraudulent representations in the forum by telephone or mail. See, e.g., D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542 (5th Cir. 1985); Interfase Marketing, Inc. v. Pioneer Technologies Group, Inc., 774 F. Supp. 1355 (M.D. Fla. 1991); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305 (N.D. Ga. 1980); J.E.M. Corp. v. McClellan, 462 F.Supp. 1246 (D. Kan. 1978).

Defendants, in response, assert that Magistrate Judge Joyner's recommendation was correct and consistent with applicable law. Defendants contend that Magistrate Judge Joyner undertook the required particularized inquiry as to Defendants' alleged tortious actions and concluded that the actions were centered in Canada with no connection to Oklahoma beyond it being Plaintiff's claimed principle place of business. Defendants assert that Plaintiff, in its brief, has failed to offer any reason why its fraud claims against Defendants should be viewed differently than the tort claims in Far West. Defendants contend that the evidence bears out, as concluded by Magistrate Judge Joyner, that Defendants did not purposefully avail themselves of the privilege of doing business in Oklahoma to the extent necessary to support the exercise of personal jurisdiction over them.

In accordance with 28 U.S.C. § 636(b)(1) and Rule 72(b), Fed. R. Civ. P., the Court has conducted a de novo review of this matter. Having done so, the Court finds that Plaintiff's objection to Magistrate Judge Joyner's Report and Recommendation is without merit. The Court concludes that Magistrate Judge Joyner's analysis is correct. The Court therefore adopts the Report and Recommendation in its entirety.

Accordingly, Magistrate Judge Joyner's Report and Recommendation (Docket Entry #13) is AFFIRMED. Defendants' motion to dismiss for lack of personal jurisdiction (Docket Entry #4) is GRANTED and Plaintiff's action against Defendants is DISMISSED WITHOUT PREJUDICE. In light of the Court's ruling, Defendants' alternative motions to dismiss for improper venue and for improper service (Docket Entry #4) are declared MOOT.

ENTERED this 27th day of February, 1998.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ACTION-PLUS MARKETING, INC., an Oklahoma corporation,

Plaintiff,

vs.

BARRY MILLAY, an individual, Harron Communications Corp., a Pennsylvania corporation,

Defendants.

Case No. 97-CV-587-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27th day of February, 1998.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

(14)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBIE DREXIL, as personal representative of the ESTATE OF FRANCIS DREXIL, deceased,

Plaintiff,

vs.

FAIRFAX MANOR, a business located in Fairfax, Oklahoma, FAIRFAX MEMORIAL HOSPITAL, a hospital located in Fairfax, Oklahoma,

Defendants

Case No. 97-CV-1071B

ORDER

Before the Court is defendant Fairfax Manor's ("Fairfax") Motion to Dismiss (Docket #2). Fairfax moves to dismiss based on lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

Francis Drexil ("Mr. Drexil") was admitted to Fairfax on or about July 5, 1994 to recover from surgery to remove a blood clot after he suffered a stroke. Mr. Drexil resided at Fairfax until September 22, 1994. He died on September 23, 1994. Bobbie Drexil ("Mrs. Drexil") initially filed a lawsuit in the District Court of Osage County, State of Oklahoma, alleging negligence and medical malpractice resulting in the death of Mr. Drexil against Fairfax and Fairfax Memorial Hospital ("Fairfax Hospital") in 1996. That suit was dismissed without prejudice on December 24, 1996. One year later, on December 24, 1997, the same cause of action was refiled in both Osage County and in this Court. The federal complaint alleges negligence, negligence per se, breach of contract, and wrongful death.

Mrs. Drexil has alleged subject matter jurisdiction based on an implied private cause of action in 42 U.S.C. § 1396(r) (of the Medicaid provisions of the Social Security Act) and the complementary 42 C.F.R. § 483.1 (of the Requirements for States and Long Term Care Facilities). Section 1396(r) states:

> The remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law. The remedies described in clauses (i), (iii), and (iv) of paragraph (2)(A) may be imposed during the pendency of any hearing. The provisions of this subsection shall apply to a nursing facility (or portion thereof) notwithstanding that the facility (or portion thereof) also is a skilled nursing facility for purposes of subchapter XVIII of this chapter.

Mrs. Drexil asserts that there is an implied private cause of action under the Medicare Act which gives her a contract-based claim against Fairfax. Thus, the issue before the Court is whether or not there is an implied contract private cause of action under the Medicare Act, 42 U.S.C. § 1396 et. seq.

Although court have been split over this issue, the trend is to find no private cause of action under the Medicare Act. *Contrast Berry v. First Healthcare Corporation*, Medicare & Medicaid Guide (CCH) ¶28,693 (D.N.H. Oct. 26, 1977) (recognizing a private cause of action), and *Roberson v. Wood*, 464 F. Supp. 983, 989 (E.D. Ill. 1979) (same), with *Stewart v. Bernstein*, 769 F.2d 1088, 1093 (5th Cir. 1985) (finding no private cause of action), *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689, 697 (N.D. Ohio 1977) (same), *Wagner v. Sheltz*, 471 F. Supp. 903, 910 (D. Conn. 1979) (same), *Chalfin v. Beverly Enterprises*, Inc., 741 F. Supp. 1162 (E.D. Penn. 1989) (same), and *Nichols v. St. Luke Center of Hyde Park*, 800 F. Supp. 1564, 1567-8 (S.D. Ohio 1992) (same).

This Court is persuaded by the rationale of courts which have found no private cause of action under the Medicare Act. The applicable test to determine whether there is an implied private cause of action is set forth in *Cort v. Ash*, 422 U.S. 66 (1975). The second prong of the *Cort* test is determinative: "is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?"[1] *Id.* at 78. *See Chalfin v. Beverly Enterprises*, 741 F. Supp. 1162 (E.D. Penn. 1989). "As the statute is silent on its face as to any private remedy, and as the Court is aware of no other objective indication that Congress intended to create a private cause of action for violations of 42 U.S.C. § 1396r," the Court concludes that Plaintiff does not have a federal claim thereunder. *Nichols v. St. Luke Center of Hyde Park*, 800 F. Supp. 1564, 1568 (S.D. Ohio 1992).

Therefore, the Defendants' Motion to Dismiss is granted for lack of subject matter jurisdiction..

IT IS SO ORDERED this 27th day of February, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

---

[1] It is true that in Cort v. Ash, the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in Cort --the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78, 95 S. Ct., at 2088--are ones traditionally relied upon in determining legislative intent. 442 U.S. 575-576, 99 S.Ct., at 2489.
Transamerica Mortgage Advisors, Inc. (TAMA), v. Harry Lewis, 444 U.S. 11, 23-4 (1979).